Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

October Term, 1999

JOHN HAMM; LINDA CONOLLY; ELAINE DECEMBRINO; KELLY BOHM,

Petitioners,

vs.

RHONE-POULENC RORER PHARMACEUTICALS, INC., A DELAWARE CORPORATION; ROBERT A. BECKER, INC., A NEW YORK CORPORATION; DR. ALEXANDER GRAHAM TURPIE; DOES, 1 THROUGH 100, INCLUSIVE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether plaintiffs have standing to bring a §1962(d) RICO conspiracy claim, where the overt acts in furtherance of the conspiracy are not §1961(1) predicate acts?

II. Whether plaintiffs have standing to bring a §1962(c) RICO claim, where the alleged injury to their professional reputations resulted from a defendant's predicate act in violation of RICO?

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Petitioners John Hamm, Linda Conolly, Elaine DeCembrino, and Kelly Bohm pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered and filed in this action on August 11, 1999.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Eighth Circuit affirming the order of the District Court is reported at 187 F.3d 941 and is reprinted in Appendix A to this Petition. The Order of the United States District Court for the District of Minnesota is contained in Civ. No. 97-1329 (D. Minn. November 24, 1997) and is reprinted in Appendix B to this Petition. The Report and Recommendation of the United States Magistrate Judge for District of Minnesota is also contained in Civ. No. 97-1329 (D. Minn. September 18, 1997) and is reprinted in Appendix C to this Petition.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered and filed on August 11, 1999. This Petition for Writ of Certiorari is filed within 90 days of the date of filing.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Jurisdiction in the District Court was based upon 28 U.S.C. §§ 1331 and 1367, and upon principles of supplemental jurisdiction. The Court of Appeals had jurisdiction under 28 U.S.C. § 1291.

STATUTES INVOLVED

This case involves two sections of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1962(c) and (d). Specifically, these provisions state:

§1962. Prohibited activities

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

The text of this statutory provision also appears in Appendix D to this Petition.

STATEMENT OF THE CASE

This case involves two important questions concerning standing under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1961 *et seq.* ("RICO"). *First,* the circuits are divided five-to-three over the circumstances in which a civil plaintiff has standing to plead a RICO conspiracy under 18 U.S.C. § 1962(d). The Eighth Circuit required a showing of injury resulting from a RICO predicate act, rather than any overt act, in order to confer standing. The question is of exceptional importance because it will determine whether employees of organizations, who are in the best position to detect and uncover racketeering activity, may bring RICO claims in the capacity of a private attorney general, thus effectuating Congress' broad remedial purpose in enacting RICO.

Second, the Civil Remedies Section of RICO, 18 U.S.C. §1964, permits actions to be brought by "any person injured in his business of property." Does this provision allow claims where the alleged injury to business or property is the business reputation of employees of companies which have engaged in racketeering activities? The Eighth Circuit held that damage to business reputation is not damage to business or property under the statute.

I. Petitioners' Complaint

This is a civil RICO action involving a fraudulent scheme by Respondents to promote the sale of "off-label" uses of pharmaceutical products. The Plaintiffs are present and former employees of Rhône-Poulenc Rorer Pharmaceuticals, Inc. ("RPR"), including sales representatives John Hamm and Kelly Bohm, promotional event coordinator Linda Conolly, and supervisor of budget and promotions Elaine DeCembrino. Respondent RPR is a manufacturer of prescription pharmaceutical and over-the-counter drugs that are distributed worldwide. Respondent Alexander G. Turpie is a Canadian physician with a contractual relationship to RPR to promote "off-label" use of RPR products. Defendant Robert A. Becker, Inc. is an advertising agency that also operates under the fictitious name Genecom.

Petitioners' RICO claims allege violations of, *inter alia,* 18 U.S.C. §§ 1962(c) and (d).[1] The statute provides in relevant part:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign

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[1] Petitioners also pled various other claims which are not at issue in this Petition.

> commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

18 U.S.C. § 1962. Petitioners asserted standing under 18 U.S.C. § 1964(c), which grants a right to sue to "[a]ny person injured in his business or property by reason of a violation of section 1962."

Petitioners' Complaint addresses a fraudulent scheme between Respondents RPR, Turpie, and Becker, Inc. (and unnamed physician Defendants) to promote uses of RPR products that had not been approved by the Food and Drug Administration ("FDA"). (Complaint at ¶¶20-21, Pet. App. E-7-8). While physicians may prescribe pharmaceuticals for use in a manner not indicated on the FDA-approved label (called "off-label" prescription), manufacturers are prohibited from promoting such off-label use. (Complaint at ¶21, Pet. App. E-8).

In an effort to obtain millions of dollars in off-label sales, Respondent RPR conspired with Respondents Becker, Turpie, and unnamed physicians to illegally promote such use. (Complaint at ¶¶30-38, 40-41, Pet. App. E-9-12, E-15-16). To effectuate their fraudulent scheme, Respondents used the U.S. mail, wire, and interstate commerce. (*Id.*).

In furtherance of this fraudulent scheme, RPR trained and directed sales representatives like Petitioners Hamm and Bohm to arrange speaking engagements for physicians at which off-label uses of RPR products would be promoted to physician groups, hospital administrators, and other medical personnel. Payments to the physicians for these engagements

were treated as if they were "unrestricted grants." RPR paid the physicians by passing the payments through Genecom to avoid appearing as if it were paying doctors to unlawfully promote off-label sales. (Complaint at ¶¶31, 33-36, Pet. App. E-9-10).

As sales representatives for Respondent RPR, Hamm and Bohm were also required to promote off-label uses nationwide and to satisfy sales criteria that required off-label sales promotion. (*Id.*, ¶35, Pet. App. E-10). As a result of these and other unlawful activities, the professional reputations of Hamm and Bohm in the medical community were damaged. (Complaint at ¶¶15, 51, 53, 62, Pet. App. E-23, E-26). DeCembrino and Conolly were ordered to falsify and destroy records which documented illegal promotion of off-label sales. (*Id.*, ¶42, Pet. App. E-17-20). All four Petitioners have been discharged, either constructively or actually, in retaliation for their disclosure of Respondents' illegal and fraudulent scheme and for their refusal to participate in it. (*Id.*, ¶¶66-69, 74-75, 79-80, 86, 95, Pet. App. E-26-30).

II. The Magistrate Judge's Report And Recommendation

The United States Magistrate Judge made his Report and Recommendation to the District Court on September 18, 1997, recommending dismissal with prejudice of Petitioners' RICO claims.[2] (Pet. App. C-27-28). According to the Magistrate Judge, dismissal was appropriate because:

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[2] At the hearing on Respondents' motion to dismiss, the parties stipulated that the motion would be based on Plaintiffs' proposed Second Amended Complaint ("Complaint"). The Complaint is reprinted in Petitioners' Appendix E to this Petition.

> [A]ny reputational injuries alleged suffered by Plaintiffs were not the direct result of those predicate acts since Plaintiffs were not the defrauded party or otherwise a target of the alleged unlawful acts. (Citations omitted.) Therefore, Plaintiffs could not show the required causal link between the alleged injury and RPR's alleged RICO violations. (Citations omitted.)
>
> Second, the RICO statute only permits a civil litigant to recover for injury to his or her "business or property." (Citations omitted.) In short, damage to reputation of this sort is not a compensable RICO injury.

(Pet. App. C-19-20). While the Magistrate Judge made no distinction between Petitioners' claims under §1962(c) and §1962(d), the court generally required a RICO predicate act to confer standing. (Pet. App. C-17).

III. The District Court's Ruling

Following the Report and Recommendation of the Magistrate Judge, the District Court granted Respondent's Motion to Dismiss for failure to state a claim on November 24, 1997. (Pet. App. B-10-11). In so doing, the District Court adopted the Magistrate Judge's reasoning, and held that "Plaintiffs have failed to assert a viable RICO claim against defendants for any injuries allegedly sustained." (Pet. App. B-4). Again, the District Court made no distinction between Petitioners' §1962(c) and §1962(d) claims.

IV. The Eighth Circuit's Ruling

On Petitioners' appeal, the Eighth Circuit affirmed the District Court, holding that Petitioners lacked standing to

assert either their §1962(c) or §1962(d) claims. 187 F.3d 941, 945, (Pet. App. A-2).

A. Injury To Professional Reputation As An "Injury To Business Or Property."

The Eighth Circuit held that Petitioners lacked standing under RICO because they failed to show injury to business or property within the meaning of 18 U.S.C. § 1964(c). (Pet. App. A-17). The Court explained that damage to reputation is generally considered personal injury and is therefore not an injury to "business or property" within the meaning of the statute. The Circuit Court cited district court cases from the Northern District of Illinois and the Western District of California in support of this holding.

B. Standing To Allege A RICO Conspiracy Under 18 U.S.C. § 1962(d).

The Eighth Circuit also affirmed the District Court's holding that Petitioners lacked standing to pursue their wrongful employment termination claims under a RICO conspiracy theory. 187 F.3d at 954 (Pet. App. A-19). The Court noted that the circuits are divided on this issue. *Id.* Petitioners argued that a plain reading of RICO requires only that an overt act committed in furtherance of a racketeering enterprise cause injury to a plaintiff. This interpretation has been adopted by the Third, Fifth, and Seventh Circuit Courts of Appeals. *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162 (3rd Cir. 1989); *Khurana v. Innovative Health Care Systems*, 130 F.3d 143 (5th Cir. 1997), cert. granted and judgment vacated by *Teel v. Khurana*, ___ U.S. ___, 1195 Ct. 442 (1998), on remand to *Khurana v. Innovative Healthcare Systems, Inc.*, 164 F.3d 900 (5th Cir. 1999); *Schiffels v. Kemper Financial Services, Inc.*, 978 F.2d 344 (7th Cir. 1992).

The Eighth Circuit did not depart from its previous holding in *Bowman v. Western Auto Supply*, 985 F.2d 383 (8th Cir. 1992), and subsequently rejected the Petitioners' arguments. 187 F.3d at 954 (Pet. App. A-19). Quoting *Bowman*, the Circuit Court held that "imposing the predicate act requirement on civil claims based on violations of § 1962(d) narrows the focus of those suits to the specific racketeering activity that lies at the heart of the RICO statute." 187 F.3d at 954 (Pet. App. A-19), citing 985 F.2d at 388.

Holding that Petitioners' injuries did not arise from RICO predicate acts, and that their injuries did not amount to an injury to "business or property," the Circuit Court concluded that the District Court had correctly dismissed the Petitioners' RICO claims for lack of standing, and affirmed.

This Petition followed.

REASONS FOR GRANTING THE WRIT

I. This Court Should Resolve The Split In The Circuits Over Whether Only RICO Predicate Acts Give Rise To Standing To Allege A RICO Conspiracy.

The Petition for Writ of Certiorari should be granted to review the Eighth Circuit's holding in the case at bar that:

> Standing to bring a civil suit . . . based on an underlying conspiracy violation of 18 U.S.C. § 1962(d) is limited to those individuals who have been harmed by a § 1961(1) RICO predicate act committed in furtherance of a conspiracy to violate RICO.

187 F.3d at 954 (Pet. App. A-19); *Bowman v. Western Auto Supply*, 985 F.2d at 388. Since this Court's denial of certiorari in *Reddy v. Litton Industries* (which then would have resolved

a two-to-one split), the division between the circuits has widened considerably on this important and recurring question of federal law. 502 U.S. 921 (1991). As discussed by the Seventh Circuit:

> The circumstances under which a private plaintiff has standing to sue under RICO have been debated and resolved in conflicting ways. The *major disagreement* centers on whether a claimant can allege injury by any overt act intended to further the enterprise, or whether the claimant must allege injury from a predicate act of racketeering. A predicate act must be one of the specifically identified acts of racketeering listed in 18 U.S.C. § 1961. An overt act can be a predicate act, or any other act in furtherance of the conspiracy to violate RICO, so it encompasses a broader range of activities giving rise to standing. The First, Second, Eighth and Ninth Circuits construe § 1962(d) narrowly, requiring a plaintiff to allege injury directly caused by a predicate act. *Miranda v. Ponce Fed. Bank*, 948 F.2d 41 (1st Cir. 1991); *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21 (2d. Cir. 1990); *Bowman v. Western Auto Supply*, 985 F.2d 383 (8th Cir. 1992); *cert. denied* 508 U.S. 957, 124 L.Ed.2d 674, 113 S. Ct. 2459 (1993); *Reddy v. Litton Industries, Inc.*, 912 F.2d 291 (9th. Cir. 1990), *cert. denied*, 502 U.S. 921, 112 S. Ct. 332, 116 L. Ed.2d 271 (1991). This circuit and the Third Circuit interpret RICO more broadly, requiring that a plaintiff only allege an overt act that furthers a RICO conspiracy, even if the overt act is not a predicate act. *Schiffels v. Kemper Financial Services, Inc.*, 978 F.2d 344 (7th Cir. 1992); *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162 (3rd Cir. 1989).

Gagan v. American Cablevision, 77 F.3d 951, 958 (7th Cir. 1996)(emphasis added).

The Fifth Circuit agreed with the reasoning of the Third and Seventh Circuit in *Khurana v. Innovative Health Care Sys., Inc.*, 130 F.2d 143 (5th Cir. 1997), cert. granted, judgment vacated by *Teel v. Khurana*, __ U.S.__, 119 S. Ct. 442, 142 L. Ed.2 442 (1998), on remand to *Khurana v. Innovative Health Care Systems, Inc.*, 164 F.3d 900 (5th Cir. 1999). The Eleventh Circuit has since sided with the Eighth Circuit in *Beck v. Prupis*, 162 F.3d 1090 (11th Cir. 1998), cert. granted, __ U.S.__, 119 S. Ct. 2046, 144 L. Ed.2d 213 (1999), which will be argued to the Court this Term.

This case should be heard alongside *Beck v. Prupis*. It is separated in time by only months from the Eleventh Circuit's decision, and it presents the Court with the identical issue. In addition, it provides the Court with an opportunity to resolve the issue of the type of injury to business or property that can confer standing, *infra*. The conflicting standards for liability under 18 U.S.C. § 1962(d) have long been recognized by the Courts of Appeals[3] and the District Courts,[4] which have

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[3] 187 at F.3d 941 ("While acknowledging the split among the circuits on this issue") (Pet. App. at A-19); *Khurana v. Innovative Health Systems, Inc.*, 130 F.3d at 143, 152 ("[t]here is a division of circuit authority"); *Beck v. Prupis*, 162 F.3d at 1908 ("[t]here is a substantial debate in the federal courts of appeals regarding whether the overt act necessary for a RICO conspiracy must be an act of racketeering"); *Rehkop v. Berwick Healthcare Corp.*, 95 F.3d 285, 290 (3rd Cir. 1996)("a majority of courts have disagreed with [the Third Circuit's ruling in] *Shearin*); *Gagan v. American Cablevision*, 77 F.3d at 958 ("this circuit split has existed for some time"); *Terminate Control Corp. v. Horowitz*, 28 F.3d 1335, 1344 n.3 (2d. Cir. 1994)("[t]here is a division of circuit of authority"); *Bowman*, 985 F.2d at 387 ([w]e acknowledge the split of authority among the circuits"); *Schiffels v. Kemper Financial Services.*, 979 F.2d at 348("[t]he circuits have split"); *Miranda v. Ponce Fed. Bank*, 948 F.2d at 48 n.9 ("we, like other circuits, find the [Third Circuit's] reasoning to be unconvincing"); *Reddy v. Litton Industries, Inc.*, 912 F.2d at 295 ("[t]wo

struggled to resolve the issue without guidance from this Court.[5]

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recent appellate court decisions have addressed this issue, and have taken opposing positions").

[4] *Sadighi v. Daghighfekr*, 36 F. Supp.2d 267, 272 (D.S.C. 1999)("The circuits are split on whether, in a section 1962(d) claim, a plaintiff's alleged injury need only flow from an overt act. . .and not necessarily from a predicate act"); *Mruz v. Caring, Inc.*, No. 97-1468, 1998 U.S. Dist. LEXIS 826, at *39 (D.N.J. Jan. 28,1998)([t]he holding of *Shearin* is not without its critics"); *Rothenberg v. Double D. Drug*, No 96-8316, 1997 U.S. Dist. 3851 at *7 (E.D. Pa. March 26, 1997) ("[w]hile Defendants' reasoning has been applied by other circuit courts, the Third Circuit interprets RICO more broadly"); *In re: American Honda Motor Co.*, 941 F. Supp. 528, 550 (D. Md. 1996)("[t]he circuits are split"); *Stonelake v. Host Marriott Corp.*, No. 95-7211, 1996 U.S. Dist. LEXIS 11170, at *2 n.4 (E.D. Pa. July 31, 1996)("[t]he holding of *Shearin* on this point has not met with universal acceptance"); *National Council on Compensation Ins. v. Hopkins*, No. 1:92-cv-082, 1995 U.S. Dist. LEXIS 21030 at *37 (E.D. Tenn. Dec. 19, 1995) ("[t]here is a division of authority among the federal circuit courts"); *Brooks-Med Imaging v. Imaging Mgmt. Assocs.*, No. 94-3442, 1995 U.S. Dist. LEXIS 1028 at *21 (D.N.J. Jan, 27, 1995)("[t]here is a is a split among the circuits"); *Casper v. Paine Webber Group*, 787 F. Supp. 1480, 1498 (D.N.J. 1992) ("[t]here is a split among the circuits").

[5] Commentators have also recognized the split between the Circuits. *E.g.*, Donald W. Cassidy, Comment, *Turning RICO on Its Head:* Schiffels v. Kemper Financial Services, Inc. *and the Need to Limit Standing Under 1962(d) to Plaintiffs Who Allege Injuries From Racketeering Acts*, 78 Minn. L. Rev. 467, 469 (1993)("[T]he Seventh Circuit followed the approach adopted by the Third Circuit, and consciously rejected contrary decisions reached by the First, Second, Eighth, and Ninth Circuits." (footnotes omitted); Dana Wolff, *Legislative Reform: The Frontier of RICO Standing: Interpreting RICO's Conspiracy Provision to Realize Congress' Goal of Creating a Powerful Crime-Fighting Weapon*, 21 Legis. 147, 147 (1995)("[s]pecifically, the courts are divided as to what type of act a private plaintiff must allege for standing purposes."); Brian M. Molinari, Note, *Conspiracy Theory: The RICO Predicate Act Requirement for Wrongful Discharge Cases Under 18 U.S.C. § 1962(d)*, 31 Suffolk U. L. Rev. 481, 494 (1997) ("[w]hile *Shearin* provided judicial guidance to courts upholding standing for civil RICO conspiracy plaintiffs,

Under the rule applied by the Third, Fifth, and Seventh Circuits, Petitioners would have standing for their RICO conspiracy claim for damages arising from their retaliatory discharge. Petitioners allege that their injuries, *i.e.*, their terminations, were overt acts of Respondents in furtherance of Respondent's RICO conspiracy. (Complaint at ¶¶63-64, Pet. App. E-26). Thus, the Petitioners have sufficiently pled an injury "by reason of a violation of Section 1962." 18 U.S.C. § 1964(c).

This conclusion is compelled by a reading of the plain language of the statute and the express mandate of Congress that RICO be read broadly to effectuate its remedial purposes. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497-98, 105 S. Ct. 3275, 87 L. Ed.2d 346 (1985) (quoting Pub.L. 91-452, § 904(a), 84 Stat. 947).

> A reading of §§ 1962(d) and 1964(c) that limits standing to sue for RICO conspiracy only to those injured by predicate acts – a limitation that does not appear on the face of those sections and is inconsistent with a natural reading of those sections – is inconsistent with this dictate.

Schiffels, 978 F.2d at 350. By requiring an injury from a RICO predicate act for standing (when no such requirement exists to find an illegal RICO conspiracy), the Eighth Circuit ignored both the plain language of the statute and the broad remedial purpose for which it was enacted. As the Third Circuit observed,

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the Second Circuit's decision in *Hecht v. Commerce Clearing House, Inc.* not only represents the current majority's position . . ., but also expressly refutes the *Shearin* court's approach.") (footnotes omitted).

> Acts that further a 1962(d) conspiracy may cause harm even when they do not themselves qualify as racketeering activity. Taking into account all of the provisions of section 1962, either racketeering activity or classic overt conspiracy acts may qualify as "predicate acts" to a RICO violation that causes injury.

Shearin, 885 F.2d at 1169. This reading of RICO makes sense. If an illegal RICO conspiracy does not require a RICO predicate act, then standing for an injury caused by conduct that furthers the conspiracy should not require a predicate act, either. As the dissent in *Bowman* observed:

> The act causing the injury has been committed to further the conspiracy and is directly related to the conspiracy's goals. This brings the injured employee well within the zone of interests RICO is meant to protect.

983 F.2d at 389 (Heaney, dissenting), quoting *Schiffels*, 978 F.2d at 351. A contrary holding "ensures that fewer instances of fraud will be uncovered and that Congress's intent in enacting the RICO statutes will be frustrated." *Id.* at 389.

The rule adopted by the First, Second, Eighth, Ninth and Eleventh Circuits does not comport with the language of the statute[6] or the intent of Congress and it reads into RICO a requirement that does not exist. In *Bowman*, for example, the Eighth Circuit expressly acknowledged that RICO was to be read broadly, and that this Court had previously reversed an overly restrictive reading of the type of injury that can confer standing. 985 F.2d at 387, citing *Sedima*, 473 U.S. at 498-99.

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[6] Specifically, section 1964(c) grants standing to "any person injured . . . by reason of a violation of Section 1962." 18 U.S.C. §1964(c).

Recognizing that the only limitation this Court imposed was a proximate causation requirement between the injury and the harm alleged, the Eighth Circuit nevertheless superimposed the additional requirement of a RICO predicate act. *Id.*, citing *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 112 S. Ct. 1311, 117 L. Ed.2d 532 (1992). "Such a reading hardly complies with the Supreme Court's and Congress's mandate that RICO be construed to effectuate its remedial purpose." *Bowman*, 985 F.2d at 389 (Heaney, dissenting), citing *Sedima*, 473 U.S. at 498.

The Circuit Court's stated intention in creating this new requirement was to "narrow[] the focus" of RICO civil actions to "the specific racketeering activity that lies at the heart of the RICO statute," 985 F.2d at 388, even though its holding appears to have purposefully excluded from such cases any conspiracy claims. In so doing, the Eighth Circuit ignored this Court's articulated mechanism to limit civil RICO claims (*i.e.*, proximate cause under *Sedima)*, and abolished a legislatively-created distinction between claims under §§ 1962(a)-(c) and those under § 1962(d). 985 F.2d at 388 ("[T]his [holding] might appear to collapse a civil RICO suit based on a § 1962(d) conspiracy into those suits based on substantive RICO violations as delineated in § 1962(a)-(c)."). *Id.* In "narrowing" the "focus," the Circuit Court eliminated an entire class of plaintiffs that Congress never intended to exclude. Review by this Court is necessary to finally resolve the issue of whether plaintiffs may bring a RICO § 1962(d) claim by reason of an injury by any overt act in furtherance of a RICO conspiracy.

II. This Court Should Resolve The Question Of Whether An Injury To Professional Reputation Is An "Injury To Business Or Property."

Petitioners assert that damage to business reputation falls within the ambit of RICO's Civil Remedies Section which authorizes actions by persons "injured in business or property by reason of violations of 18 U.S.C. § 1962." 18 U.S.C. §1964(c). The Eighth Circuit relied exclusively on district court decisions to support its denial of standing to the Petitioners on the basis that their business reputational harm was not a harm recognized by RICO. In the absence of binding authority on this issue, other Courts of Appeal have held the opposite.

Recently, the Fifth Circuit Court of Appeals concluded that the denigration of a RICO plaintiff's professional reputation caused by his association with his employer's racketeering activity was an injury to business or property under 18 U.S.C. § 1964(c). *Khurana*, 130 F.3d at 151. In *Khurana*, the plaintiff-physician alleged harm through his association with his employer's fraudulent Medicare and Medicaid practices. The Fifth Circuit concluded that the damage to Khurana's professional reputation "was a foreseeable result of the various racketeering acts of wire and mail fraud." *Khurana*, 130 F.3d at 151.

The district court cases relied upon by the Eighth Circuit to support its holding that business reputation is not a RICO injury can be distinguished from the present case. In *City of Chicago Heights v. Lobue*, 914 F. Supp. 279 (N.D. Ill. 1996), the District Court concluded that damages to a City's reputation was not injury to business or property. In that case, however, the injuries complained of by the City included the "bad press" it received as a result of having been involved with "crooked dealing, corrupt city officials and unpaid royalties." 914 F. Supp. at 285. The District Court viewed

this damage to the City as "personal injury." *Id.* Further, the District Court in *Chicago Heights* found that a portion of the loss being claimed by the City could not be traced to the Respondents' predicate acts. By contrast the Petitioners' harm in this case is directly linked to the Respondents' RICO predicate acts; Petitioners' loss of business reputation results directly from Respondents' unlawful promotion of drugs. The Petitioners are individuals vulnerable in their business careers to their unfortunate association with the Respondents' racketeering activities. A municipality, such as Chicago Heights, Illinois, will necessarily survive as a consequence of its unique status as a governmental subdivision. Therefore, the harm complained of in *Chicago Heights* is not comparable to the harm alleged by the Petitioners here.

In *Teledyne Defense Contracting Derivative Litigation*, 849 F. Supp. 1369 (C.D. Calif. 1993), it should be noted that criminal prosecutions of persons involved in racketeering activities became an intervening cause that severed the causation necessary to a finding of RICO injury. Therefore, *Teledyne* provides an inappropriate comparison to the case at bar.

Accordingly, the Eighth Circuit's conclusion -- that the Petitioners' alleged harm was not compensable as an injury to business or property -- was not supported by substantial authority. *Khurana*, from the Fifth Circuit, supports the principle that business reputational loss is compensable as a loss to business or property under RICO.

This Court should grant Petitioners' request for the issuance of a Writ on the significant question of whether harm to business reputation is a RICO injury to business or property. Addressing this issue is particularly appropriate in light of the Petitioners' first issue with respect to conspiracy theory. By granting certiorari, and including the issue of injury to business or property, the Court will clarify two

highly significant issues in connection with the adjudication of RICO standing.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 98-1063

John Hamm; Linda Conolly; Elaine Decembrino; Kelly Bohm,	*	
Appellants,	*	
v.	*	
Rhone-Poulenc Rorer Pharmaceuticals, Inc., a Delaware corporation; Robert A. Becker, Inc., a New York corporation; Dr. Alexander Graham Turpie; Does,1 through 100, inclusive,	*	Appeal from the United States District Court for the District of Minnesota
Appellees.	*	

Submitted: February 11, 1999

Filed: August 11, 1999

Before McMILLIAN, JOHN R. GIBSON and MURPHY, Circuit Judges.

McMILLIAN, Circuit Judge.

Appellants are present and former employees of defendant Rhone-Poulenc Rorer Pharmaceuticals, Inc. (RPR), a pharmaceutical company, who are appealing from a final order entered in the United States District Court[1] for the District of Minnesota, granting summary judgment in favor of RPR (and the other defendants) and dismissing their civil Racketeer Influenced and Corrupt Organizations Act (RICO) claims for failure to state a claim and their pendent state claims for lack of subject matter jurisdiction. Hamm v. Rhone-Poulenc Rorer Pharmaceuticals, Inc, Civil No. 97-1329 (DSD/JMM) (D. Minn. Nov. 25, 1997) (district court order adopting report and recommendation of magistrate judge).[2] For reversal, appellants argue that the district court erred in (1) converting RPR's Rule 12(b)(6) motion to dismiss into a motion for summary judgment and denying their motion to voluntarily dismiss the action without prejudice and (2) dismissing their civil RICO claims for lack of standing. For the reasons discussed below, we affirm the judgment of the district court.

JURISDICTION

The district court had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 (RICO, 18 U.S.C. §§ 1961-1968), 1367(a) (supplemental jurisdiction over state law claims). This court has appellate jurisdiction pursuant to 28 U.S.C. § 1291. The district court entered its judgment on November

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[1] The Honorable David. S. Doty, United States District Judge for the District of Minnesota.

[2] The Honorable John M. Mason, United States Magistrate Judge for the District of Minnesota.

25, 1997, and appellants timely filed a notice of appeal on December 24, 1997, pursuant to Fed. R. App. P. 4(a).

BACKGROUND FACTS

Appellants filed this class action against RPR, their employer and a manufacturer of prescription and over-the-counter drugs, and defendants Robert A. Becker, Inc. (Becker), an advertising agency that also operated under the fictional name Genecom, Dr. Alexander Turpie, a physician and a Canadian citizen, and other defendants, asserting civil RICO claims and related state law claims. In their second amended complaint, appellants alleged that RPR constructively discharged, defamed or retaliated against them because they criticized or refused to participate in RPR's alleged violations of federal law. Appellants alleged that RPR marketed four pharmaceutical products in an unlawful manner by promoting off-label uses.[3] Once the Food and Drug Administration (FDA) approves a drug, physicians may prescribe the drug for use or in a manner not indicated on its FDA-approved label. However, manufacturers are prohibited from promoting such off-label uses.

Appellants alleged that RPR conspired with Becker, Turpie and unnamed physicians and others to illegally promote the use of RPR products prior to FDA approval or for off-label uses with the intent to defraud hospital administrators, physicians and other medical personnel into prescribing or purchasing RPR products, through the use of the mail, wire communications and facilities of interstate commerce, and that appellants were "unwilling pawns" in the fraudulent scheme. More specifically, appellants alleged that

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[3] "An 'off-label' use of an approved product is a specific use for which that product has not been approved by the FDA." In re Kessler, 100 F.3d 1015, 1015 n.1 (1997).

RPR improperly marketed four of its pharmaceutical products by promoting those products for off-label use and by compensating physicians for prescribing those products, in violation of applicable federal law. Appellants alleged that RPR carried out its fraudulent scheme by providing information about off-label use of its products to RPR sales representatives, encouraging RPR sales representatives to solicit physicians who would prescribe RPR products for off-label use, arranging speaking events for physicians who prescribed RPR products for off-label use, setting sales quotas that implicitly included off-label sales of RPR products, using Genecom to pay physicians to serve as speakers, and paying physicians to promote off-label uses of RPR products. Appellants alleged that, when they reported these unlawful off-label promotional activities to RPR legal officials, those officials told them to rewrite promotional event payment requests and to destroy evidence of illegal promotions. According to appellants, RPR conducted these activities through the use of the mail, wire communications and facilities of interstate commerce.

Appellants also alleged that defendants conducted or participated in a pattern of racketeering activity, that is, obtaining money from illegal promotions of RPR products by Genecom. Appellants alleged that defendants sent promotional materials and obtained or paid money through the mail (mail fraud, 18 U.S.C. § 1341), transmitted promotional materials and made false representations by interstate telephonic communications (wire fraud, 18 U.S.C. § 1343), and used the facilities of interstate commerce with the intent to distribute the proceeds gained from illegal kickbacks and payments made to influence the promotion and use of RPR products (18 U.S.C. § 1952).

Appellants claimed no injury or damage to themselves as a result of any of RPR's allegedly illegal promotional activities; however, they alleged that the intent and purpose of

these promotional activities was to defraud hospital administrators, physicians and other medical personnel by persuading them to prescribe or purchase RPR's products. Appellants also claimed personal injury because they either criticized or refused to participate in RPR's fraudulent scheme and as a result were terminated, denied promotion and compensation, lost stock options, and defamed.

Before filing an answer, RPR filed a Rule 12(b)(6) motion to dismiss the first amended complaint on the ground that appellants did not have standing to assert civil RICO claims and failed to properly plead racketeering activity. (Turpie also filed a motion to dismiss.) The parties agreed that all motions to dismiss applied to the second amended complaint and that all rulings would apply to all party defendants. The district court referred the motion to dismiss to a magistrate judge for a report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B). During oral arguments on the motion to dismiss, the magistrate judge questioned counsel for appellants about the effect, if any, on their civil RICO claims of Bowman v. Western Auto Supply Co., 985 F.2d 383, 385-86 (8th Cir.) (Bowman), cert. denied, 508 U.S. 957 (1993), in which this court held that employees discharged for criticizing or refusing to participate in the employer's racketeering activity lacked standing to bring a civil RICO claim when the underlying violation is based on 18 U.S.C. § 162(a), (b) or (c). Counsel for appellants conceded that, under Bowman, appellants could not base a civil RICO claim on allegations of wrongful discharge, denial of promotion, loss of compensation or benefits, harassment or intimidation, and retaliation. That left only appellants' defamation or damage to business reputation claim. Counsel for appellants then argued that appellants had been defamed not because they had criticized or refused to participate in the illegal promotion of off-label uses and kickbacks, but instead because they had actually participated in the illegal scheme.

This was the opposite of what was alleged in the second amended complaint.

The magistrate judge recommended that the civil RICO claims be dismissed with prejudice for failure to state a claim and that the state law claims be dismissed without prejudice for lack of subject matter jurisdiction. The magistrate judge noted that appellants did not claim that RPR's fraudulent scheme was directed or targeted at them (the employees); rather, RPR's fraudulent scheme was directed at hospital administrators, physicians and other medical personnel who prescribed and purchased RPR products. The magistrate judge considered the civil RICO claims as pleaded and as supplemented by counsel for appellants during oral argument and concluded that, under either theory, appellants lacked standing to bring civil RICO claims. The magistrate judge also found that any reputational injury was not the direct result of the RICO predicate acts (mail fraud, wire fraud, use of facilities of interstate commerce) and there was no causal link between the injury and the RICO predicate acts. See Report and Recommendation, slip op. at 10-21. That finding meant that appellants also lacked standing to bring a civil RICO conspiracy claim in violation of 18 U.S.C. § 162(d) because Bowman limited such standing to individuals who have been harmed by a RICO predicate act committed in furtherance of a conspiracy to violate RICO. See 985 F.2d at 388.

The magistrate judge also found that appellants lacked standing to bring a civil RICO claim because reputation is not "business or property" and thus an injury to one's reputation is not an injury for purposes of RICO. See Report and Recommendation, slip op. at 19, citing 18 U.S.C. § 1964(c). The magistrate judge also found that appellants lacked standing to brings civil RICO claim because RICO was not intended to permit individuals who actually participated in a

fraudulent scheme in violation of RICO to then seek treble damages under RICO. See id. at 20.

The magistrate judge also recommended that appellants' civil RICO claims should be dismissed with prejudice because they had already had three opportunities to plead facially valid claims and it would be futile for appellants to amend because, as a matter of law, appellants cannot allege any set of facts under which they would have standing to assert civil RICO claims. See id. at 23-24. The magistrate judge also recommended declining to exercise supplemental jurisdiction over appellants' state law claims, see id. at 25, and dismissing those claims without prejudice.

Appellants filed objections to the report and recommendation and a notice of voluntary dismissal and a motion for dismissal without prejudice. RPR moved to strike the notice of voluntary dismissal and opposed the motion for dismissal without prejudice. The district court reviewed the case de novo and adopted the recommendation of the magistrate judge but converted the Rule 12(b)(6) motion to dismiss into a motion for summary judgment because, in its opinion, the magistrate judge had considered matters outside the pleadings, specifically, the allegation made during oral argument that appellants had actually participated in the fraudulent scheme. See Order, slip op. at 5. The district court also denied the motion for voluntary dismissal and for dismissal without prejudice. The district court decided that appellants could not voluntarily dismiss without court approval because the case was a class action, see id. at 7, and, in addition, because the Rule 12(b)(6) motion to dismiss had been converted to a motion for summary judgment. See id. at 9. Finally, the district court decided that no notice of the conversion from a Rule 12(b)(6) motion to dismiss to one for summary judgment was required because, as a matter of law, appellants lacked standing to bring either civil RICO

substantive claims or civil RICO conspiracy claims. See id. at 11. This appeal followed.

DISCUSSION

Summary Judgment Conversion

First, we consider appellants' argument that the district court erred in converting RPR's Rule 12(b)(6) motion to dismiss into a summary judgment motion. This court reviews a district court's decision to convert a Rule 12(b)(6) motion to dismiss into a motion for summary judgment for abuse of discretion. See, e.g., Kehs v. Foster, 16 F.3d 1227 (8th Cir.) (per curiam) (table), cert. denied 511 U.S. 1107 (1994). Unquestionably, RPR filed a Rule 12(b)(6) motion to dismiss appellants' claims. Rule 12(b)(6) itself provides that when matters outside the pleadings are presented and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56. Our court has interpreted the phrase "matters outside the pleadings" to include "any written or oral evidence in support of or in opposition to the pleading that provides some substantiation for and does not merely reiterate what is said in the pleadings." Gibb v. Scott, 958 F.2d 814, 816 (8th Cir. 1992) (citation omitted). Statements of counsel at oral argument raising new facts not alleged in the pleadings constitute "matters outside the pleadings" and, if considered by the district court, require treatment of a Rule 12(b)(6) motion to dismiss as one for summary judgment. See, e.g., Smith v. Local No. 25, Sheet Metal Workers International Ass'n, 500 F.2d 741, 744 (5th Cir. 1974) (treating a Rule 12(b)(6) dismissal order as automatically converted into summary judgment because district court relied on materials outside the pleadings, including oral argument); Judge v. Johnson Warren Lines Inc., 205 F. Supp. 700, 702 (D. Mass. 1962) (holding

that a Rule 12(b)(6) motion to dismiss should be treated as a motion for summary judgment when plaintiff's counsel relied upon facts outside the four corners of the complaint during oral argument of the motion).

Appellants argue that they did not raise matters outside the pleadings but merely reiterated matters in the pleadings. The district court found, however, that counsel for appellants made new allegations in opposition to RPR's motion to dismiss and that the magistrate judge not only considered the new allegations but also rejected them. When asked by the magistrate judge to state whether appellants' civil RICO claims were barred by the Bowman decision, counsel for appellants conceded that Bowman barred appellants' civil RICO claims for all their employment-related injuries. This concession left only their alleged injury to reputation. The magistrate judge then asked whether "in other words, it's the defamation which you say survives after the Bowman case?" Counsel for appellants agreed with that characterization. Appellants' second amended complaint alleged that they had been defamed and suffered damages to their business reputations because they had criticized or refused to participate in the fraudulent promotional activities. During the oral argument before the magistrate judge, however, counsel for appellants argued that appellants had been defamed because they actually participated in the fraudulent promotional activities. Counsel for appellants admitted that this actual participation argument was not included in any of their pleadings and that the omission was an oversight. The magistrate judge nonetheless gave appellants the benefit of the doubt and not only considered their claims as set forth in their pleadings (that they had refused to participate) but also their claims as supplemented during the oral argument (that they had actually participated). The magistrate judge concluded that neither allegation stated a civil RICO claim. In ruling on appellants' objections to the magistrate judge's

report and recommendation, the district court found that the magistrate judge had considered the unpled theory of reputational injury and recognized that such a claim was a matter outside the pleadings which required treating the Rule 12(b)(6) motion to dismiss as one for summary judgment. See Order, slip op. at 5. We hold that the district court did not abuse its discretion in converting the pending Rule 12(b)(6) motions to dismiss into ones for summary judgment.

Appellants also argue that, even if the district court properly converted RPR's Rule 12(b)(6) motion to dismiss into one for summary judgment, the district court erred in failing to give them formal notice of its intent to do so. This argument fails because it was appellants, not RPR, who submitted the new matters.

> Constructive notice that the [district] court will consider matters outside of the complaint is sufficient. A district court's failure to give formal notice that it will treat a motion to dismiss for failure to state a claim as a motion for summary judgment is harmless where the nonmoving party has submitted materials outside of the pleadings in support of its resistance to a motion to dismiss....

Madewell v. Downs, 68 F.3d 1030, 1048 (8th Cir. 1995) (citations omitted). In the present case, the lack of formal notice was harmless. As noted, counsel for appellants submitted materials outside the pleadings by introducing the new allegation and new theory of defamation during oral argument on the motions (appellants were the nonmoving parties). In addition, there was no showing that any material facts were in dispute or missing from the record because the district court in fact considered the new allegation and new theory and granted summary judgment as a matter of law for failure to state a civil RICO claim. See Order, slip op. at 12

(holding appellants could not show a causal link between the alleged injury and RPR's alleged RICO violations and reputational injury is not injury to business or property); see also Buck v. FDIC, 75 F.3d 1285, 1288 & n.3 (8th Cir. 1996) (noting difference between standards for dismissing a complaint under Rule 12(b)(6) and for granting summary judgment are not significant where issue was decided as a matter of law, without reference to facts). Reliance upon Court v. Hall County, 725 F.2d 1170 (8th Cir. 1984), and Layton v. United States, 919 F.2d 1333 (8th Cir. 1990), is misplaced. In each of those cases, the moving party, not the nonmoving party, submitted matters outside the pleading, and the nonmoving party was prejudiced by not having an opportunity to respond to the moving party's new issues. See Layton v. United States, 919 F.2d at 1335; Court v. Hall County, 725 F.2d at 1171. In addition, the motion to dismiss at issue in Layton v. United States was a Rule 12(b)(1) motion which, unlike a Rule 12(b)(6) motion, is not subject to conversion into a summary judgment motion. See 919 F.2d at 1335.

Voluntary Dismissal

Appellants also argue that the district court erred in denying their motion to voluntarily dismiss pursuant to Fed. R. Civ. P. 41(a)(1)(i). Appellants argue that their right to voluntarily dismiss without prejudice cannot be cut off by a motion to dismiss but only by an answer or a motion for summary judgment. RPR filed a Rule 12(b)(6) motion to dismiss but did not file an answer or a motion for summary judgment (although, as discussed above, the district court converted that motion to dismiss into a motion for summary judgment).

Rule 41(a) identifies those instances in which the plaintiff must obtain the approval of the court before the action can be

dismissed voluntarily. Once an answer or a motion for summary judgment has been filed, an action may be dismissed at the plaintiff's request only upon order of the court and upon such terms and conditions as the court deems proper. See Fed. R. Civ. P. 41(a)(1)(i). A decision whether to allow a party to voluntarily dismiss a case rests upon the sound discretion of the court. See, e.g., Bodecker v. Local Union No. P-46, 640 F.2d 182, 186 n.5 (8th Cir. 1981). In exercising that discretion, a court should consider factors such as whether the party has presented a proper explanation for its desire to dismiss, see, e.g., Paulucci v. City of Duluth, 826 F.2d 780, 783 (8th Cir. 1987); whether a dismissal would result in a waste of judicial time and effort, see, e.g., Tikkanen v. Citibank(South Dakota) N.A., 801 F. Supp. 270, 273-74 (D. Minn. 1992); and whether a dismissal will prejudice the defendants, see, e.g., Metropolitan Federal Bank of Iowa, F.S.B. v. W.R. Grace & Co., 999 F.2d 1257, 1262 (8th Cir. 1993). Likewise, a party is not permitted to dismiss merely to escape an adverse decision nor to seek a more favorable forum. See, e.g., Holmgren v. Massey-Ferguson, Inc., 516 F.2d 856, 857 n.1 (8th Cir. 1975); International Shoe Co. v. Cool, 154 F.2d 778, 780 (8thCir.), cert. denied, 329 U.S. 726 (1946).

The district court did not err in denying appellants' motion to voluntarily dismiss the action without prejudice. Here, appellants filed their motion for voluntary dismissal after RPR's motion for summary judgment had been filed, served, and ruled upon by the district court. Thus, appellants had no right to voluntary dismissal without a court order. A Rule 12(b)(6) motion to dismiss, which has been converted by the district court into a motion for summary judgment, is considered for purposes of Rule 41(a)(1)(i) as a motion for summary judgment See Kurkowski v. Volcker , 819 F.2d 201, 203 (8th Cir. 1987) (holding that a converted motion to dismiss precluded voluntary dismissal under Rule 41

(a)(1)(i)); Chambers v. Gesell, 120 F.R.D. 1, 2 (D.D.C. 1988) (holding that for purposes of Rule 41(a)(1), a converted Rule 12(b)(6) motion to dismiss is properly treated as a motion for summary judgment).

In addition, this case was a putative class action. The district court treated the case as a class action although no class had been certified before summary judgment was granted. Assuming for purposes of analysis that Fed. R. Civ. P. 23(e) applies to putative class actions before certification of the class by the district court, the status of the present case as a putative class action is another reason why appellants could not voluntarily dismiss without approval of the district court. Rule 4l(a)(1)(i) provides in part that voluntary dismissals are "[s]ubject to the provisions of Rule 23(e)." See, e.g., Rice v. Ford Motor Co., 88 F.3d 914, 919-20 & n.8 (11th Cir. 1996).

The district court also considered appellants' motion to voluntarily dismiss under Fed. R. Civ. P. 41(a)(2). The district court found that appellants had provided no legitimate justification for their request to dismiss and inferred that appellants were seeking to avoid an adverse decision on their civil RICO claims so that they could sue in another, arguably more favorable forum. See Order, slip op. at 13. The district court concluded that voluntary dismissal would waste the substantial efforts expended by the magistrate judge and the district court and would prejudice defendants by depriving them of a valid defense. See id. We hold that the district court did not abuse its discretion in denying appellants' motion to voluntarily dismiss under Rule 41(a)(2).

Standing to Assert Civil RICO Claims

On the merits, appellants argue that the district court erred in dismissing their civil RICO substantive and conspiracy claims for lack of standing. They argue that the damage to their business reputations caused, by RPR's

fraudulent scheme promoting off-label drug use, conducted through mail fraud, wire fraud and use of facilities of interstate commerce, constituted the requisite injury to their "business or property." They also argue that there was a sufficiently "direct" relationship between the injury (damage to business reputation) and the RICO predicate acts (mail fraud, wire fraud, use of facilities of interstate commerce). Appellants also argue that it was irrelevant, for purposes of RICO standing, that they were not the objects or targets of the racketeering activity. We disagree and hold the district court did not err in dismissing appellants' civil RICO substantive and conspiracy claims for lack of standing.

The civil enforcement provision of RICO provides that "[a]ny person injured in his [or her] business or property by reason of a violation of section 1962...may sue therefor in any appropriate United States district court and shall recover threefold the damages...and the cost of the suit, including a reasonable attorney's fee." 18 U.S.C. § 1964(c). Section 1962 has three substantive provisions (18 U.S.C. § 1962(a), (b), (c)) and one conspiracy provision (18 U.S.C. § 1962(d)).[4] "[ARICO] plaintiff only has standing if, and can only recover to the extent that, he [or she] has been injured in his [or her] business or property by the conduct constituting the

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[4] 18 U.S.C. § 1962(a) prohibits the use or investment of income derived from a pattern of racketeering activity in any enterprise engaged in interstate commerce; § 1962(b) prohibits the acquisition of any enterprise engaged in interstate commerce through a pattern of racketeering activity; § 1962(c) prohibits participation in the conduct of an enterprise engaged in interstate commerce through a pattern of racketeering activity. Section 1962(d) makes it unlawful to conspire to violate § 1962(a), (b) or (c). A "pattern of racketeering activity" requires at least two acts of racketeering activity within 10 years, § 1961(5), and "racketeering activity" is defined in part by reference to specific unlawful acts, the majority of which are crimes, see 18 U.S.C. § 1961(1), which the Supreme Court has termed "predicate acts." See Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 495 (1985).

violation." Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 495-96 (1985) (Sedima). Thus, the two requirements for RICO standing are (1) an injury to "business or property" (2) caused "by reason of" a RICO violation. Appellants did not satisfy either requirement.

First, in examining the statutory language "by reason of" in § 1964(c), the Supreme Court held that, to have standing under RICO, the plaintiff must have been injured by conduct which constitutes racketeering activity, that is, RICO predicate acts, and not by other conduct of the defendant. See Sedima, 473 U.S. at 496-97, citing Haroco, Inc. v. American National Bank & Trust Co, 747 F.2d 384, 398 (7th Cir. 1984), aff'd, 473 U.S. 606 (1985)). This was because "the compensable injury necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern, for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise." Id. at 497. The Supreme Court further refined the RICO standing requirement in Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 266-68 (1992) (Holmes), by refusing to read RICO expansively to allow all factually injured plaintiffs to recover. The Court rejected "but for" causation and instead construed RICO to require proximate cause, that is, "some direct relation between the injury asserted and the injurious conduct alleged." See id. at 268 (drawing analogy to causation under § 4 of the Clayton Act, 15 U.S.C. § 15, citing Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519 (1983)). The Court required proximate cause for three reasons.

> First, the less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent, factors. Second, quite apart from problems of proving factual causation, recognizing

> claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries. And, finally, the need to grapple with these problems is simply unjustified by the general interest in deterring injurious conduct, since directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely.

Id. at 269 (citations omitted).

In the present case, appellants alleged that the racketeering activity was RPR's fraudulent scheme to promote off-label use of its products. That fraudulent scheme was not directed at appellants, but instead at hospitals, physicians and other medical personnel. Because appellants were not the intended targets of the alleged racketeering activity, they did not have standing to bring a civil RICO suit See, e.g., Abrahams v. Young & Rubicam, Inc., 79 F.3d 234, 238 (2d Cir.), cert. denied, 519 U.S. 816 (1996).

In the second amended complaint, however, appellants claimed that they had been injured because they had criticized or refused to participate in the fraudulent scheme and that RPR had retaliated against them by terminating them, denying them promotions, compensation awards, stock options, and pension benefits, and defaming them (by damaging their business reputations). We considered similar allegations and rejected them as a basis for a civil RICO suit in Bowman. In that case, the plaintiff alleged that he had discovered that his employer was double-billing its suppliers, he had refused to participate in the scheme, and he was discharged for criticizing or refusing to participate in the employer's racketeering activity. The plaintiff asserted both substantive

RICO claims under 18 U.S.C. § 1962(a)-(c) and a RICO conspiracy claim under 18 U.S.C. § 1962(d). The district court denied the employer's motion to dismiss for lack of standing but certified the issue for interlocutory appeal. We accepted the interlocutory appeal and reversed, holding that, as a matter of law, the employee lacked "standing to bring a 'whistle blower' wrongful discharge suit [against the employer] under 18 U.S.C. § 1964(c) when the underlying RICO violation is based on § 1962(a), (b), or (c)." 985 F.2d at 386; see also id. at 385 (citing cases from other circuits). The court explained that "[t]he simple act of discharging an employee . . . does not constitute racketeering activity as defined in RICO, and thus does not fall within the definition of what the Supreme Court has termed 'predicate acts' under RICO." Id. at 385-86.

Appellants' claims are virtually identical to those found insufficient in Bowman. Like the employee in that case, appellants alleged that they had been injured not by their employer's racketeering activity but by the employer's retaliatory acts after they criticized or refused to participate in the racketeering activity. The injurious acts, taken as alleged, were clearly wrong; however, appellant's injuries were not proximately caused by the employer's racketeering activity.

Appellants acknowledged that under Bowman they lacked standing to assert their employment-related injuries in a civil RICO suit; however, they argued that Bowman did not bar their RICO claims for defamation, that is, for damage to their business reputations. In the second amended complaint, appellants alleged that RPR defamed them because they criticized or refused to participate in the fraudulent scheme. We hold that, under the reasoning in Bowman, appellants lacked standing to bring a civil RICO suit because the damage to their business reputations was not proximately caused by the racketeering activity. See, e.g., Abrahams v. Young & Rubicam, Inc, 79 F.3d at 238-39 (holding plaintiff could not

establish a RICO claim because he was not target of bribery scheme; targets were defendant's commercial rivals; plaintiff's reputation and business were injured by fallout from scheme's exposure); Pujol v. Shearson/ American Express, Inc., 829 F.2d 1201, 1205-06 (1st Cir. 1987) (holding plaintiff who alleged he was fired, slandered and otherwise injured because, he reported and opposed employer's illegal scheme lacked standing to assert RICO claim because he was not target of any of acts pleaded as RICO predicate acts); Vitone v. Metropolitan Life Insurance Co., 954 F. Supp. 37, 38-39 (D.R.I. 1997) (holding plaintiff lacked RICO standing because damage to plaintiff's reputation and involvement in litigation were directly caused by employer's termination and post-termination conduct and not RICO predicate acts).

As noted above, during oral argument on the motions to dismiss, counsel for appellants argued that appellants' business reputations were damaged because they had actually participated in the fraudulent scheme. The class of persons who may sue under RICO is limited to those whose injuries were directly caused by RICO violations. See Holmes, 503 U.S. at 269-70. In order to show the "direct relation" required by Holmes between the injury asserted and the racketeering activity alleged, "the plaintiff must show both that he [or she] is within the class the statute sought to protect and that the harm done was one that the statute was meant to prevent." Abrahams v. Young & Rubicam, Inc., 79 F.3d at 237 & n.3 (discussing RICO standing in terms of statutory intent rather than proximate cause; question is whether the plaintiff was in the category the statute meant to protect and whether the harm that occurred was the mischief the statute sought to avoid). In the present case, appellants alleged that RPR's fraudulent scheme was directed at hospitals, physicians and other medical personnel, and not at appellants. Thus, appellants were not the intended targets of the fraudulent scheme. Their injuries were derivative and incidental, not direct. The direct

injuries were those suffered by the hospitals, physicians and other medical personnel who were induced to purchase RPR products for off-label use. Although it is true that "but for" the fraudulent scheme, appellants would not have participated in the fraudulent scheme and their business reputations would not have damaged, "but for" causation is not enough to establish RICO standing. We hold that any damage to appellants' business reputations was indirect and too remote a consequence of RPR's alleged racketeering activity directed against third-parties and, thus, appellants lacked standing to assert RICO claims.

Appellants also lacked standing because they failed to show any injury to "business or property." Damage to reputation is generally considered personal injury and thus is not an injury to "business or property" within the meaning of 18 U.S.C. § 1964(c). See, e.g., City of Chicago Heights v. Lobue, 914 F. Supp. 279, 285 (N.D. Ill. 1996) (damage to city's business reputation not injury to "business or property" compensable under § 1964(c)); In re Teledyne Defense Contracting Derivative Litigation, 849 F. Supp. 1369, 1372 n.1 (C.D. Cal. 1993) (noting injuries to "business reputation" are not cognizable under RICO).

Finally, appellants argue that the district court erred in dismissing for lack of standing their civil RICO conspiracy claim under 18 U.S.C. § 1962(d). Appellants argue that, unlike a substantive RICO claim under 18 U.S.C. § 1962(a), (b) or (c), in order to establish standing to bring a civil RICO conspiracy claim under § 1962(d), they need only allege that their injury was caused by any overt act in furtherance of the conspiracy and not a RICO predicate act. This argument was rejected in Bowman. While acknowledging the split among the circuits on this issue,[5] Bowman explained that

[5] The split among the circuits on this issue may be resolved next Term. See Beck v. Prupis, 162 F.3d 1090 (11th Cir. 1998) (holding overt act must be predicate act), cert. granted, 119 S. Ct. 2046 (1999).

"[i]mposing the predicate act requirement on civil claims based on violations of § 1962(d) narrows the focus of those suits to the specific racketeering activity that lies at the heart of the RICO statute." 985 F.2d at 388.

CONCLUSION

In sum, we hold that the district court did not err in converting RPR's Rule 12(b)(6) motion to dismiss into a motion for summary judgment and in denying appellants' motion to voluntarily dismiss the action without prejudice and in holding appellants lacked standing to assert civil RICO claims. Accordingly, we affirm the judgment of the district court.

A true copy.

Attest:

U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Civil No. 97-1329(DSD/JMM)

John Hamm, Linda Conolly,
Elaine Decembrino, and
Kelly Bohm,

Plaintiffs,

v. **ORDER**

Rhone-Poulenc Rorer Pharmaceutical
Inc., a Delaware Corporation,
Robert A. Becker, Inc., a New York
Corporation, Dr. Alexander Graham
Turpie, and Does 1 through 100, inclusive,

Defendants.

James C. Wicka, Esq., Joseph W. Lawyer, Esq. and Messerli & Kramer, 1800 Fifth Street Towers, 150 South Fifth Street, Minneapolis, MN 55402, counsel for plaintiffs.

James L. Volling, Esq., Charles F. Knapp, Esq. and Faegre & Benson, 2200 Norwest Center, 90 South Seventh Street, Minneapolis, MN 55402 and Kell M. Damsgaard, Esq. and Morgan, Lewis & Bockius, 2000 One Logan Square, Philadelphia, PA 19103, counsel for Rhone-Poulenc Rorer.

Phillip Gainsley, Esq., Gainsley Law Office, 701 Fourth Avenue South, Suite 527, Minneapolis, MN 55415, counsel for Alexander Graham Turpie.

This matter is before the court on plaintiffs' objections to a Report and Recommendation of United States Magistrate Judge John M. Mason dated September 18, 1997. Also before the court is plaintiffs' voluntary dismissal and motion for voluntary dismissal and defendant Rhone-Poulenc Rorer's motion to strike plaintiffs' voluntary dismissal. Based on a review of the file and record in this case, the court adopts the recommendations of Magistrate Judge Mason, strikes plaintiffs' voluntary dismissal, and denies plaintiffs' motion for voluntary dismissal.

BACKGROUND

Plaintiffs in this case are one present and three former employees of defendant Rhone-Poulenc Rorer Pharmaceuticals, Inc. (hereafter "RPR"), a Delaware corporation. Defendant Robert A. Becker, Inc. is a New York corporation. Defendant Alexander Graham Turpie, M.D., is a citizen and resident of Canada. The unnamed defendants are officers, managing directors, legal counsel and other persons involved in the transactions complained of by plaintiffs, essentially that RPR illegally promoted several of its pharmaceutical products by promoting off-label uses of these drugs. Plaintiffs contend that their criticism of these practices resulted in retaliatory acts by RPR. They bring one federal claim, under the RICO statute, and a group of supplemental state law claims alleging constructive discharge, defamation and other discrimination arising from their refusal to participate in RPR's alleged violations of federal law.

On August 15, 1997, RPR filed a motion pursuant to Fed. R. Civ. P. 12(b)(6) (hereafter "Rule 12(b)(6)") to dismiss the

RICO counts of plaintiffs' lawsuit with prejudice for lack of standing and failure to state a claim. Plaintiff also sought dismissal of the remaining state law claims for lack of subject matter jurisdiction. See Docket No. 6. Dr. Turpie brought a similar motion, and also sought attorney fees and costs. See Docket No. 10. This matter came before United States Magistrate Judge John M. Mason on September 2, 1997.

In his ensuing Report and Recommendation dated September 18, 1997, Magistrate Judge Mason recommended that the motions of RPR and Dr. Turpie be granted, the RICO claims asserted against all defendants be dismissed with prejudice, the remaining state law claims asserted against RPR in Counts III through X of plaintiff's second amended complaint be dismissed without prejudice and the motion of Dr. Turpie for costs and attorney fees be denied. Plaintiff has filed timely objections.

Subsequent to the filing of their objections, plaintiffs filed both a voluntary dismissal and motion for voluntary dismissal pursuant to Fed. R. Civ. P. 41(a)(1)-(2). Defendants have moved to strike the voluntary dismissal and oppose plaintiffs' motion.

DISCUSSION

A. Plaintiffs' Objections to Report and Recommendation

In their objections to Magistrate Judge Mason's Report and Recommendation, plaintiffs contend that the magistrate judge erred in finding that plaintiffs have suffered no "direct" injuries and therefore lack standing to proceed with their RICO claims. Plaintiffs also contend that, even if they lack standing to proceed with their RICO claims, dismissal should be without prejudice.

This court utilizes a de novo standard of review in examining those portions of the magistrate judge's report to

which plaintiffs have filed objections. 28 U.S.C. § 636(b)(1)(C); D. Minn. L.R. 72.1(c)(2) ("A judge shall make a de novo determination of those portions to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the Magistrate Judge."). After independently reviewing the transcript of the hearing on this matter, the file and record and relevant caselaw, the court agrees with the magistrate judge's recommendation that the RICO claims asserted against the defendants be dismissed with prejudice. Plaintiffs have failed to assert a viable RICO claim against defendants for any injuries allegedly sustained.

While agreeing with the magistrate judge's analysis, the court modifies the basis upon which dismissal is granted. The magistrate judge analyzed this case under Rule 12(b)(6) as a motion for judgment on the pleadings. This court, however, finds that matters outside the pleadings were considered by the magistrate judge. Specifically, at the hearing on this issue the magistrate judge heard the allegation of plaintiffs' counsel, not contained in the second amended complaint, that because plaintiffs actually participated in the alleged illegal activity of RPR, a defamation claim giving rise to a RICO claim is cognizable. The magistrate judge then analyzed and debunked this argument in his report. Report and Recommendation (Docket No. 22) at 18-19. Rule 12(b)(6) dictates that "[i]f, on a [12(b)(6) motion], matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 Dismissal of plaintiffs' RICO claims is therefore granted pursuant to Fed. R. Civ. P. 56 (hereafter "Rule 56") rather than Rule 12(b)(6). Given the court's dismissal of this case under Rule 56, the issue of prejudice regarding dismissal of plaintiffs' RICO claims pursuant to Rule 12(b)(6) is moot.

B. Plaintiff's Voluntary Dismissal and Motion for Voluntary Dismissal

Plaintiffs have filed both a voluntary dismissal, pursuant to Fed. R. Civ. P. 41(a)(1) (hereafter "Rule 41(a)(1)") and a motion for an order granting a voluntary dismissal.[1] In both cases, plaintiffs seek a dismissal without prejudice to re-commence their suit. Rule 41(a)(1) provides:

> Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of the court (I) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

Rule 41(a)(1) explicitly provides which cases can and cannot be dismissed without court approval. As relevant here, a case cannot be dismissed without court approval if the case is a class action or if a motion for summary judgment is served

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[1] Although plaintiffs bring their motion pursuant to Fed. R. Civ. P. 41(a)(1), such a motion is proper under Rule 41(a)(2), which provides in relevant part that "an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper."

prior to such dismissal. If a case cannot be voluntarily dismissed, a court order is required under Fed. R. Civ. P. 41(a)(2) (hereafter "Rule 41(a)(2)").

The parties dispute whether Rule 23(e) is implicated in this case and whether defendants, motions to dismiss under Rule 12(b)(6) have been converted into motions for summary judgment under Rule 56. Both issues involve an examination of the Federal Rules, and to that task the court now turns.

A voluntary dismissal under Rule 41(a)(1) is explicitly made subject to Rule 23(e), which dictates in relevant part that "[a] class action shall not be dismissed or compromised without the approval of the court." If a class action is involved, therefore, a voluntary dismissal is not allowed under Rule 41(a)(1) and a court order is required.

Plaintiffs' complaint is entitled "Class Action for Violation of the Racketeer Influence and Corrupt Organizations Act and State Law." The complaint begins by stating that "[t]his is a class action complaint pursuant to Federal Rules of Civil Procedure 23 on behalf of present and former employees of Rhone-Poulenc Rorer Pharmaceutical ...." The complaint contains allegations detailing why class certification is appropriate. The court, however, has yet to consider the class certification issue.

As an initial matter, the court notes that there is a split of authority on whether Rule 23 (e) applies to pre-certification voluntary dismissals under Rule 41(a)(1), and the Eighth Circuit has not explicitly spoken to this issue. In this case the court holds that even though no ruling has yet been made on class certification, Rule 23(e) applies because the complaint contains class allegations. In so holding, the court follows what it finds to be the majority approach and the holding of at least one other district court in this circuit. In Wallican v. Waterloo Community School Dist. in Black Hawk County, 80 F.R.D. 492, 493 (N.D. Iowa 1978), the parties filed a stipulation of dismissal before the court had decided whether

the suit could be maintained as a class action under Fed. R. Civ. P. 23. The court, while approving such dismissal, explicitly held that the court's Rule 23 supervisory responsibilities and powers were applicable even in the precertification stage of the case. Id. at 493. Other circuits have also concluded that Rule 23(e) applies before class certification. See Baker v. America's Mortgage Servicing, Inc., 58 F.3d 321, 324 (7th Cir. 1995) (holding that Rule 23(e) applies to all complaints containing class allegations, including proposed class actions not yet certified by the district court) (citing Glidden v. Chromalloy American Corp., 808 F.2d 621, 626 (7th Cir. 1986)); Diaz v. Trust Territory of Pacific Islands, 876 F.2d 1401, 1408 (9th Cir. 1989) ("We therefore adopt the majority approach and hold that Rule 23(e) applies before certification."); Kahan v. Rosenstiel, 424 F.2d 161, 169 (3d Cir. 1970), cert. denied, 398 U.S. 950 (1970) ("[A] suit brought as a class action should be treated as such for purposes of dismissal or compromise, until there is a full determination that the class action is not proper."). But see Shelton v. Pargo, Inc., 582 F.2d 1298 (4th Cir. 1978) (taking the approach that a case with class allegations should not be considered a true class action until the class has been certified).

Given the court's treatment of this case as a class action, it follows that plaintiffs may not file a voluntary dismissal pursuant to Rule 41(a)(1), but must first seek approval of the court. Defendants' motion to strike plaintiffs, voluntary dismissal is therefore granted.

Even if the court were to ignore the weight of authority on the class action issue, plaintiffs' voluntary dismissal would still not be permissible under Rule 41(a)(1) due to the court's treatment of defendants' 12(b)(6) motion as a Rule 56 motion for summary judgment. A motion to dismiss pursuant to Rule 12(b)(6) "'must be treated as a motion for summary judgment when matters outside the pleadings are presented and not

excluded by the trial court.'" Gibb v. Scott, 958 F.2d 814, 816 (8th Cir. 1992) (citing Woods v. Dugan, 660 F.2d 379, 380 (8th Cir. 1981) (per curiam)). As discussed in Gibb, "'[m]ost courts...view matters outside the pleading as including any oral or written evidence in support of or in opposition to the pleading that provides some substantiation for and does not merely reiterate what is said in the pleadings. Gibb, 958 F.2d at 816 (citing Wright & Miller, Federal Practice and Procedure § 1366). This interpretation of what constitutes "matters outside the pleadings" is appropriate given Eighth Circuit precedent that a 12(b)(6) motion will succeed or fail based upon the allegations contained on the face of the complaint. Gibb, 958 F.2d at 816.

At the hearing on defendants' motions to dismiss, plaintiffs made new allegations, detailed above, in opposition to defendants' motions to dismiss. The magistrate judge considered and rejected these new allegations in granting defendants' motions. These new allegations converted defendants' motions to dismiss into motions for summary judgment. See Kurkowsi v. Volcker, 819 F.2d 201, 203 (8th Cir. 1987) ("Under Fed. R. Civ. P. 12(b), a defendant's motion to dismiss is transformed into a motion for summary judgment when matters outside the pleadings are also submitted to the court. When a motion for summary judgment is outstanding, dismissal must be pursuant to Rule 41(a)(2), thus the automatic dismissal provisions of Rule 41(a)(1)(I) would not apply."); Smith v. Local No. 25, Sheet Metal Workers Intern. Ass'n, 500 F.2d 741, 744 (5th Cir. 1974) (holding that because the district court relied on affidavits, other extra-pleading materials, and oral argument on the motion for dismissal on the pleadings, the motion was automatically converted into one for summary Judgment). Because a voluntary dismissal is prohibited under Rule 41(a)(1) in these circumstances, a court order is required.

The court notes that the conversion of a 12(b)(6) motion into a motion for summary judgment normally requires notice to the parties. Gibb, 958 F.2d at 816 ("The district court's failure to treat the motions as motions for summary judgment and to provide the parties with notice and an opportunity to provide further materials requires reversal unless the failure constituted harmless error"). In this case, no such notice is required. The magistrate judge recommended, and this court concurs, that the RICO statute is inapplicable to defendants as a matter of law, as plaintiffs can offer no facts which bring the harm suffered within the reach of the statute. As Magistrate Judge Mason noted, "although Plaintiffs allege that Defendants committed several predicate acts, any reputational injuries allegedly suffered by Plaintiffs were not the direct result of those predicate acts since Plaintiffs were not the defrauded party or otherwise the target of the alleged unlawful acts.... Therefore, Plaintiffs could not show the required causal link between the alleged injury and RPR's alleged RICO violations." Report and Recommendation (Docket No. 22) at 19. Magistrate Judge Mason also pointed out that the RICO statute only permits a civil litigant to recover for injury to her "business or property," and harm to one's reputation does not fall within either category. Id. Because the court finds dismissal appropriate as a matter of law, plaintiffs need not be afforded the opportunity to proffer additional affidavits or other evidence. See Buck v. F.D.I.C., 75 F.3d 1285, 1288 n.3 (8th Cir. 1996) ("[B]ecause we decide the applicability of the WARN Act to bridge banks as a matter of law, and without reference to facts, we attach no significance to the distinction between dismissal under Rule 12(b)(6) and summary judgment under Rule 56.").

Because the court finds that a voluntary dismissal under Rule 41(a)(1) is not allowed both because Rule 23(e) applies and a motion for summary judgment has been considered, plaintiffs must seek an order of the court under Rule 41(a)(2)

to voluntarily dismiss their complaint. No such order will be granted in this case. Plaintiffs chose to bring this action in this district despite the fact that none of the parties have a substantial connection to this state. Now, faced with adverse authority on their RICO claims, plaintiffs seek permission to dismiss. Plaintiffs provide no legitimate justification for this action, and a fair inference is that they seek to re-file in another circuit where their RICO claims might be cognizable. To allow such an action would waste the substantial efforts expended by the magistrate judge and this court and would prejudice the defendants by depriving them of a valid defense. Plaintiffs chose to file this action in the District of Minnesota, and must now deal with the consequences.

CONCLUSION

Based on de novo review of the record, the court affirms Magistrate Judge Mason's report, although dismissal of plaintiffs' RICO claims is granted pursuant to Fed. R. Civ. P. 56. In addition, the court strikes plaintiffs' voluntary dismissal and denies plaintiffs' motion for voluntary dismissal. Therefore, **IT IS HEREBY ORDERED** that:

1. The reasoning in the report and recommendation of Magistrate Judge John M. Mason is hereby adopted by this court, although plaintiffs' RICO claims are dismissed with prejudice pursuant to Fed. R. Civ. P. 56;

2. The motions of defendants Rhone-Poulenc Rorer Pharmaceuticals, Inc. and Alexander Graham Turpie, M.D., to dismiss plaintiffs' second amended complaint are granted;

3. The remaining state law claims asserted against defendant Rhone-Poulenc Rorer in Counts III through X of plaintiffs' second amended complaint are dismissed without prejudice;

4. The motion of defendant Alexander Graham Turpie, M.D., for costs and attorney fees is denied.

5. Defendants' motion to strike the voluntary dismissal of plaintiffs is granted.

6. Plaintiffs' motion for voluntary dismissal is denied.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: November 24, 1997

/s/
David S. Doty, Judge
United States District Court

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

JOHN HAMM, LINDA CONOLLY, ELAINE DECEMBRINO and KELLY BOHM,

Plaintiffs,

v.

RHONE-POULENC RORER PHARMACEUTICALS, INC., a Delaware corporation, ROBERT A. BECKER, INC., a New York corporation, DR. ALEXANDER GRAHAM TURPIE, and DOES 1 through 100, inclusive,

Defendants.

Court File No. 97-1329 (DSD/JMM)

REPORT AND RECOMMENDATION

This case is brought by one present and three former employees of Defendant Rhone-Poulenc Rorer Pharmaceuticals Inc. ("RPR"). The Second Amended Complaint alleges that Plaintiffs were constructively discharged, defamed and/or otherwise discriminated against in their employment because they opposed and refused to participate in RPR's alleged violations of federal law. Plaintiffs specifically allege that RPR marketed four pharmaceutical products--Lovenox, Taxotere, Azmacort, and Nasacort AQ--in an unlawful manner by promoting off-label uses of these drugs. An off-label use of a product approved by the Food and Drug Administration ("FDA") is a specific use for which that product has not been approved by the

FDA.[1] Plaintiffs assert that their criticism of these alleged illicit marketing activities prompted retaliatory acts by RPR. Second Amended Complaint ¶ 9, 42. Plaintiffs allege that this Court has subject matter jurisdiction based on a federal question, 28 U.S.C. § 1331, namely, section 1964(c) of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1964(c), and upon principles of supplemental jurisdiction. See 28 U.S.C. § 1367.

This matter came before the Court on September 2, 1997, on the Motion of RPR to Dismiss Plaintiffs' Amended Complaint [Docket No. 6] and the Motion of Dr. Alexander Graham Turpie to Dismiss Plaintiffs' Complaint and for Costs and Attorney Fees [Docket No. 10]. This matter is properly before the undersigned Magistrate Judge for Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 72.1. [Docket No. 18]. Joseph W. Lawver, Esq., appeared on behalf of Plaintiffs; Kell M. Damsgaard, Esq., James Volling, Esq., and Charles F. Knapp, Esq., appeared on behalf of RPR; Phillip Gainsley, Esq., appeared on behalf of Dr. Turpie; Todd Wind, Esq., appeared on behalf of Robert A. Becker, Inc. ("Becker").

Plaintiffs filed a Motion for Leave to Amend to file a Second Amended Complaint. [Docket Nos. 4 & 5]. That motion was later withdrawn in light of a stipulation, wherein

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[1] In re Kessler, 100 F.3d 1015 n.1 (D.C. Cir. 1997). The Food, Drug and Cosmetic Act restricts a manufacturer's promotion of its products to those uses indicated on its FDA approval label. Second Amended Complaint ¶ 20 (citing 21 U.S.C. § 301, et seq.; 21 C.F.R. § 202.1(e)(4)(i)(a), (ii) and (iii); 21 C.F.R. § 202.1(e)(6)(i) and (xi); 21 C.F.R. § 201.128). Once the FDA approves a drug, physicians may prescribe the drug for use, or in a manner, not indicated on its FDA-approved label. However, a manufacturer is prohibited from promoting such off-label use. Second Amended Complaint ¶ 21; see also Washington Legal Foundation v. Kessler, 880 F. Supp. 26, 28 n.1 (D. D.C. 1995); Ortho Pharmaceutical Corp. v. Cosprophar, Inc., 828 F. Supp. 11 14, 1126 n.16 (S.D.N.Y. 1993), aff'd, 32 F.3d 690 (2d Cir. 1994).

the parties agreed that Plaintiffs' Motion for Leave to Amend would be heard on September 2, 1997, at the same time that the Court considered the Motions to Dismiss. [Docket Nos. 17 & 19]. At the hearing on September 2, 1997, this Court orally granted Plaintiffs' Motion for Leave to Amend. The parties have thus stipulated that the Motions to Dismiss brought by RPR and Dr. Turpie are applicable to Plaintiffs' Second Amended Complaint. [Docket No. 19]. The parties also have stipulated that "[s]hould the Court grant defendants RPR's and Turpie's Motions to Dismiss, the decision shall apply equally to defendant Becker." [Docket No. 19]

The Motion of RPR seeks an order pursuant to Rule 12 of the Federal Rules of Civil Procedure dismissing the RICO counts of Plaintiffs' lawsuit with prejudice due to lack of standing and failure to state a claim, and dismissing the remaining state law counts for lack of subject matter jurisdiction. RPR argues that Plaintiffs do not have standing to assert the RICO claims and that Plaintiffs have not properly pled any racketeering activity. [Docket No. 6]. The Motion brought by Dr. Turpie also seeks an order pursuant to Rule 12 seeking the dismissal of Plaintiffs' action for failure to state a claim upon which relief can be granted. Dr. Turpie also seeks an award of costs and attorney's fees. [Docket No. 10].

FINDINGS OF FACT/REPORT

Standard of Review

The Court of Appeals for the Eighth Circuit has provided this standard for the consideration of a Motion to Dismiss pursuant to Rule 12(b)(6):

> "[A] motion to dismiss a complaint should not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts which would

> entitle him to relief. *Thomas W. Garland, Inc. v. City of St Louis,* 596 F.2d 784, 787 (8th Cir.), *cert denied,* 444 U.S. 899, 100 S.Ct. 208, 62 L.Ed.2d 135 (1979). We must take the well-pleaded allegations of the complaint as true, and construe the complaint, and all reasonable inferences arising therefrom, most favorably to the pleader. *United States v. Mississippi,* 380 U.S. 128, 143, 85 S.Ct. 808, 816, 13 L.Ed.2d 717 (1965); *see also Bennett v. Berg,* 685 F.2d 1053, 1058-59 (8th Cir. 1983); *Bramlet v. Wilson,* 495 F.2d 714, 717 (8th Cir. 1974)."

Morton v. Becker, 793 F.2d 185, 187 (8th Cir. 1986); accord Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Hilton v. Pine Bluff Public Schools, 796 F.2d 230, 231-32 (8th Cir. 1986).

In considering a motion to dismiss, courts accept the plaintiff's factual allegations as true, but reject conclusory allegations of law and unwarranted inferences. Silver v. H&R Block, Inc., 105 F.3d 394, 397 (8th Cir. 1997).

> "The appropriate inquiry is not whether plaintiff will ultimately prevail but whether he will be allowed to introduce evidence to support his claims. *Scheuer,* 416 U.S. at 236, 94 S. Ct. at 1686. Because dismissal on the pleadings is an extreme remedy it is not favored by the courts and is employed only when 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S. Ct. 99, 101-02, 2 L.Ed.2d 80 (1957) (footnote omitted); *see Robinson v. MFA Mutual Insurance Co.,* 629 F.2d 497, 500 (8th Cir. 1980)."

TCF Banking and Savings, F.A. v. Arthur Young & Co., 706 F. Supp. 1408, 1410 (D. Minn. 1988). Thus, it is only in the

unusual case where the complaint on its face reveals some insuperable bar to relief that a dismissal under Rule 12(b)(6) is warranted. United States v. Aceto Agricultural Chemicals Corp., 872 F.2d 1373, 1376 (8th Cir. 1989); R. W. Murray Co. v. Shatterproof Glass Corp., 697 F.2d 818, 821 (8th Cir. 1983).

Although Courts frequently state the requirement that a Complaint may not be dismissed unless plaintiff can prove "no set of facts in support" of the claim, the phrase is not applied literally, as is apparent from a review of the decisions granting motions to dismiss. It is clear, however, that the standard for dismissal under Rule 12(b)(6) is a very high one. The Court may not consider materials outside the pleadings on a motion to dismiss. Gibb v. Scott, 958 F.2d 814, 816 (8th Cir. 1992).

Plaintiffs' Factual Allegations

Plaintiffs John Hamm and Kelly Bohm were employed by RPR as sales representatives at all times material to this lawsuit. Second Amended Complaint ¶¶ 4, 7. Plaintiff Linda Conolly was employed by RPR as either a data entry clerk, promotional literature coordinator, or promotional event coordinator at all times material to this action. Id. at ¶ 5. Plaintiff Elaine DeCembrino was employed as a Supervisor of Budget and Promotion at RPR at all relevant times. Id. at ¶ 6.

RPR is a manufacturer of prescription pharmaceutical and over-the-counter drugs, which are distributed world wide. Id. at ¶ 8. Defendant Becker is a closely held New York corporation, which Plaintiffs allege also operates under the "fictitious" name Genecom. Id. at ¶ 10. Genecom, a division of Becker, was allegedly established to field requests for unrestricted grants from medical institutions. Id. at ¶ 32. Plaintiffs allege that RPR and Becker, through a pattern of racketeering activity, have employed the Genecom enterprise

"as a conduit for illegal payments to speakers associating with Genecom and Defendants who will promote Off-Label use of Lovenox." Id. at ¶ 38. Defendant Alexander Graham Turpie, one of those alleged speakers, is a medical doctor who resides in Canada. Id. at ¶ 11. The true names of the Defendants sued as Does 1 through 100, who are purportedly "the officers, managing directors, legal counsel, other members of management, physician speakers, and other advisors who were involved in the design, implementation, and approval of the transactions complained of herein or who received the benefit from these transactions," are allegedly unknown to Plaintiffs. Id. at ¶ 12.

Plaintiffs' Second Amended Complaint, which is styled a "Class Action," is brought on behalf of a class consisting of "all persons employed by [RPR], who have: been terminated, denied promotional opportunities, denied compensation rewards, lost stock option plans, deprived of pension benefits and subjected to intimidation and harassment, and defamed for **either refusing to participate** in the illegal promotion of Off-Label usage of [RPR] products and kickbacks to parties committing to use of its products." Id. at ¶ 13.[2] Plaintiffs assert that the class consists of at least several hundred present and former employees of RPR. Id. at ¶ 14.

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[2] No "or" clause follows the "either" clause in paragraph 13 of the Second Amended Complaint. At the hearing on September 2, 1997, Plaintiffs' counsel initially asserted that this was a drafting oversight and that the phrase "or actually participating" should have been included at the end of the above-quoted language of that paragraph. However, Plaintiffs' counsel later took the position that his clients in fact were not defamed by "refusing to participate in the illegal promotion of Off-Label usage of [RPR] products and kickbacks to parties committing to use of its products," but that Plaintiffs were only defamed by actually participating in the fraudulent scheme, an allegation that is not contained anywhere in the Second Amended Complaint.

Plaintiffs allege that Defendants conspired to illegally promote the use of RPR products prior to FDA approval or for off-label use with the intent to defraud hospital administrators, physicians, and other medical personnel into prescribing or purchasing RPR products. Id. at ¶ 22. Defendants allegedly engaged in this conduct under the false pretense that the monetary grants provided by RPR were unrestricted, when, in fact, RPR's grant programs, in which Defendants Becker and Dr. Turpie participated, were conditional upon selecting speakers and using materials intended to promote off-label use of RPR's products. Id. at ¶¶ 23-24. Plaintiffs allege that, after complaints and FDA investigations regarding off-label promotions, RPR concocted the illegal scheme to promote off-label sales of its products through the conduit Genecom enterprise. Id. at ¶ 32. These alleged transactions involving Dr. Turpie and other doctors, wherein the physicians accepted speaking engagements for pay from Genecom or RPR to promote the off-label uses of RPR products, were purportedly conducted by U.S. mail and via telephonic communications. Id. at ¶¶ 38-39.

Plaintiffs also allege that Defendants have conducted or participated in a pattern of racketeering activity. Plaintiffs assert that Defendants devised schemes to obtain money from the illegal promotions of RPR products by means of false pretenses through the Genecom enterprise in violation of 18 U.S.C. § 1314. Second Amended Complaint ¶ 25. To effectuate and implement the schemes, Defendants allegedly (1) sent promotional materials and obtained or issued payment of money through the U.S. mail in violation of 18 U.S.C. § 1341; (2) transmitted promotional materials and made false representations by interstate telephonic communications in violation of 18 U.S.C. § 1343; and (3) used the facilities of interstate commerce, including the mail, with the intent to distribute proceeds gained from illegal kickbacks and payments made to influence the promotion and use of RPR

products, in violation of 18 U.S.C. § 1952(1). Second Amended Complaint ¶¶ 26-28. Defendants also allegedly used interstate commerce, including the U.S. mail, with the intent to facilitate the promotion, management, establishment and carrying on of the unlawful activity of kickbacks and illegal influencing of the sale and use of RPR products in violation of 18 U.S.C. § 1952(3). Second Amended Complaint ¶¶ 29. Plaintiffs specifically allege that Defendants "employed schemes to influence Off-Label use and paid kickbacks for promotion of Lovenox, Nasacort AQ, Taxotere, Rilutek" and other drugs by use of the U.S. mail and telephonic communications. Id. at ¶ 40. Plaintiffs allege that it was illegal for RPR and its co-conspirators to pay any remuneration either in cash or in kind to induce physicians to prescribe drugs which may be paid under Medicare programs or other state health care programs. Id. at ¶ 41 (citing 42 U.S.C. § 1320a7b(b)(2)).

Plaintiff Hamm and other RPR sales representatives were allegedly trained by RPR at sales training seminars on off-label uses of Lovenox. Second Amended Complaint ¶¶ 31, 42(a)-(c), (j). Plaintiffs assert that sales representatives were trained and instructed "to solicit the request for unrestricted grants...from physicians practicing in areas outside of Lovenox's indicated use." Id. at ¶ 33. These sales representatives then allegedly would arrange for a speaker from a short list of physicians known to promote off-label uses of Lovenox, and off-label Lovenox protocols were allegedly distributed by area managers. Id. at ¶ 34. Plaintiff Hamm allegedly was instructed to make direct solicitations with physicians who would prescribe Lovenox. Id. at ¶ 31. RPR allegedly required its sales representatives, over protest, to promote off-label uses nationwide, and established sales criteria which required off-label promotion in order to achieve commission bonuses, promotions, or to maintain their employment status. Id. ¶ 35, 42(k). Specific quotas of the

off-label Genecom programs were allegedly required by management. Id. ¶ 36.

The Second Amended Complaint contains additional factual allegations that relate to the individual Plaintiffs. Plaintiff DeCembrino allegedly advised Terry Green, in-house counsel at RPR, that RPR was promoting Nasacort AQ and Taxotere prior to its receiving FDA approval. The legal department allegedly directed DeCembrino and others to pay for these illegal promotions. In addition, Green allegedly asked DeCembrino to rewrite promotional event payment requests and to destroy evidence of illegal promotions. Id. at ¶ 42(d). Plaintiff DeCembrino also allegedly advised RPR's corporate legal department that many of the promotional event payment requests indicated that they were designed for promoting off-label use of Lovenox, but that payments were nonetheless processed and made. Id. at ¶ 42(e).

When Plaintiffs Conolly and DeCembrino allegedly asked what they should do with promotional event payment requests out of compliance with FDA or company policies, the purported response from Ron Amey, the Director of Marketing, was that nothing was going to change "until someone gets caught." Id. at ¶ 42(f), (h). Plaintiffs Conolly and DeCembrino were also allegedly told by Dean Murray, the Manager of Creative Services at RPR, that "If you are so moral and ethical maybe you should look elsewhere, maybe out of the company" and "how the hell do you expect the reps to sell if they don't do Off-Label promotions, we only have me-too products." Id. at ¶ 42(h). Plaintiff Bohm was also allegedly told "you talk to much" by her supervisor, who stated that he would not support her promotion request after she advised him of her refusal to participate in off-label promotions. Id. at ¶ 42(i).

DISCUSSION

I. Plaintiffs Lack Standing to Assert RICO Claims

A. An Overview

Civil litigants only have standing to assert RICO claims if their "business or property" was damaged "by reason of a violation of" one of RICO's substantive provisions. 18 U.S.C. § 1964(c). The alleged predicate acts of Plaintiffs' RICO claims brought pursuant to 18 U.S.C. § 1962 are mail fraud under 18 U.S.C. § 1341, wire fraud under 18 U.S.C. § 1343, and violations of the Travel Act under 18 U.S.C § 1952. Plaintiffs correctly note that these activities are listed as "racketeering activity" under 18 U.S.C. § 1961(1). See Plaintiff's Memorandum of Law at 4-5. However, the Court finds that Plaintiffs' RICO claims should be dismissed under the controlling case of Bowman v. Western Auto Supply Co., 985 F.2d 383, 384 (8th Cir.), cert. denied, 508 U.S. 957 (1993). In Bowman, the United States Court of Appeals for the Eighth Circuit held that RICO does not confer standing upon employees who are fired for speaking out against and criticizing an employer's fraudulent scheme.

In this case, Plaintiffs themselves concede that, under Bowman, they cannot base a RICO claim upon allegations of wrongful discharge, denial of promotional opportunities, loss of compensation or benefits, harassment, intimidation or retaliation. That leaves Plaintiffs' defamation claim as the only remaining basis upon which Plaintiffs could possibly assert a RICO claim. At oral argument, however, Plaintiffs' counsel conceded that his clients were not defamed for "refusing to participate in the illegal promotion of Off-Label usage of [RPR] products and kickbacks to parties committing to use of its products." This admission is contrary to the Second Amended Complaint, which asserts that Plaintiffs

were defamed for their refusal to participate in these activities. Because Plaintiffs have now withdrawn that allegation, Plaintiffs' counsel essentially admits that the Second Amended Complaint, as pled, does not assert a viable RICO claim against Defendants for any of Plaintiffs' alleged injuries. See Second Amended Complaint ¶ 13.[3]

At oral argument, Plaintiffs' counsel argued for the first time that Plaintiffs have a valid RICO claim because they actually participated in Defendants' alleged fraudulent scheme. As noted earlier, this allegation is not made anywhere in the Second Amended Complaint. For this proposition, Plaintiffs' counsel relies on some pre-Bowman Eighth Circuit authority, which refused to recognize a distinction between "direct" and "indirect" RICO injuries. The Court finds Plaintiffs' contentions unpersuasive.

It is now well-settled that RICO claims are only cognizable if the RICO violation caused a "direct" injury; "indirect" injuries are not cognizable. The present case is factually similar to the recent Bowman decision, and the Court is not convinced that a different result should obtain in this instance. Moreover, Plaintiffs do not claim that RPR's alleged off-label promotion or remuneration of physicians was directed or targeted at Plaintiffs themselves, a requirement for RICO standing. The Second Amended Complaint specifically alleges that Defendants conspired "to defraud hospital administrators, physicians, and other medical personal [sic] into prescribing or purchasing [RPR] products." Second Amended Complaint ¶ 22. The Second Amended Complaint only claims that Plaintiffs were injured for criticizing or

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[3] In their responsive papers, Plaintiffs' counsel took the position that Plaintiffs had standing to assert RICO claims. In light of Plaintiffs' counsel's admissions at the hearing that none of the pleaded allegations of the Second Amended Complaint could give rise to a RICO claim, it is unclear why Plaintiffs' counsel filed that pleading in the first place. See Fed. R. Civ. P. 11.

refusing to participate in the alleged wrongdoing and that RPR retaliated against them for this behavior. Even if the Court ignores Plaintiffs' counsel's statement at the hearing which effectively withdrew these allegations, these allegations are indistinguishable from the allegations in Bowman. Consequently, Plaintiffs' RICO claims should be dismissed.

If Plaintiffs' Second Amended Complaint were construed to make the allegation that it was Plaintiffs' actual participation in Defendants' alleged fraudulent conduct that gave rise to a RICO claim, this Court would still recommend that Defendants' Motions to Dismiss be granted.

B. The RICO Statute

RICO contains a civil enforcement scheme that permits private individuals to recover treble damages for injuries "by reason of a violation of" its substantive provisions. Sedina, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 481 (1985) (citing 18 U.S.C. § 1964(c)); accord Bowman, 985 F.2d at 384. The Act provides as follows:

> "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee . . . ."

18 U.S.C. § 1964(c). Thus, this provision confers standing on any individual who has experienced injury to his or her "business or property" that occurred "by reason of" a RICO violation. Bowman, 985 F.2d at 384; Brennan v. Chestnut, 973 F.2d 644, 648 (8th Cir. 1992).

RICO takes aim at "racketeering activity," which it defines as any act "chargeable" under several generically

described state criminal laws, any act "indictable" under numerous specific federal criminal provisions, including mail and wire fraud, and any "offense" involving bankruptcy or securities fraud or drug-related activities that is "punishable" under federal law. 18 U.S.C. § 1961 (1); Sedima, 473 U.S. at 481. Section 1962, entitled "Prohibited activities," outlaws (a) the use of income derived from a "pattern of racketeering activity" to acquire an interest in or establish an enterprise engaged in or affecting interstate commerce; (b) the acquisition or maintenance of any interest in an enterprise "through a pattern of racketeering activity"; (c) conducting or participating in the conduct of an enterprise "through a pattern of racketeering activity"; and (d) conspiring to violate any of these provisions. 18 U.S.C. § 1962(a)-(d).

Plaintiffs assert that they have standing to assert a RICO claim against the Defendants pursuant to 18 U.S.C. § 1962(a), (c) and (d). In pertinent part, section 1962(a) provides:

> "it shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity...to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce."

18 U.S.C. § 1962(a). Section 1962(c) provides:

> "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs

through a pattern of racketeering activity or collection of unlawful debt."

18 U.S.C. § 1962(c). Section 1962(d) provides: "it shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section." 18 U.S.C. § 1962(d).

C. The "Direct" Injury Requirement

In order to have standing to assert a RICO claim, a plaintiff must do more than show that a defendant violated section 1962, that the plaintiff was injured, and that the defendant's violation was a "but for" cause of plaintiffs injury. Instead, the plaintiff must show "proximate causation" between the injury and the harm alleged in order to show that the injury to his or her business or property was "by reason of" a RICO violation. Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 265-68 (1992) (citing 18 U.S.C. § 1964(c)); United Healthcare Corp. v. American Trade Ins. Co., 88 F.3d 563, 572 (8th Cir. 1996); Bowman, 985 F.2d at 388. One of the "central elements" of the proximate causation standard is "the directness of the relationship between 'the injury asserted and the injurious conduct alleged.'" Id. at 387 (quoting Holmes, 503 U.S. at 268-69).

The reasons for including "a directness element" are threefold. First, the less direct the relationship, the more difficult it is to determine how much of the damage is due to the alleged RICO conduct and how much to extraneous conduct. Second, courts may have significant difficulty apportioning damages among plaintiffs who are removed, in varying degrees, from the alleged injurious conduct. Third, the more directly an individual is injured, the more likely that individual will take on the role of private attorney general,

and thus help uphold the law. Bowman, 985 F.2d at 387 (citing Holmes, 503 U.S. at 269-70).

Two pre-Holmes cases from the United States Court of Appeals for the Eighth Circuit held that RICO standing could be predicated upon "indirect" injury. Alexander Grant & Co. v. Tiffany Industries, 742 F.2d 408 (8th Cir. 1984), vacated, 473 U.S. 922 (1985); Terre Du Lac Ass'n, Inc. v. Terre Du Lac, Inc., 772 F.2d 467 (8th Cir. 1985), cert. denied, 475 U.S. 1082 (1986); see also Kamm v. McFliker, 662 F. Supp. 924 (W.D. Mo. 1987). These decisions are no longer good law in light of Holmes, which held that "[a]llowing suits by those injured only indirectly would open the door to 'massive and complex damages litigation...and undermine the effectiveness of treble-damages suits.'" Holmes, 503 U.S. at 274 (quoting Associated General Contractors of Cal., Inc. v. Carpenters, 459 U.S. 519, 545 (1983)); accord Bieter Co. v. Blomquist, 987 F.2d 1319, 1325 n.4 (8th Cir.), cert. denied, 510 U.S. 823 (1993); Bowman, 985 F.2d at 388.

D. The Merits

RPR and Dr. Turpie assert that Plaintiffs lack standing to bring a RICO claim against them. Defendants rely principally on the Eighth Circuit's Bowman decision. In that case, Richard Bowman, a ex-employee of Western Auto Supply Company, alleged that he was discharged from his employment for speaking out against Western Auto's alleged RICO violation. In particular, he contended that he was discharged because he protested and criticized his employer's allegedly fraudulent scheme of "double billing" its merchandise suppliers by charging them for advertising and promotional services they never received. Western Auto moved to dismiss the action under Rule 12(b)(6) on the ground that Bowman lacked standing to bring a civil RICO suit. The district court denied that motion but certified the

issue for appeal. On appeal, Bowman contended that he had standing to sue based on injuries arising from both alleged substantive violations of RICO as delineated in 18 U.S.C. § 1962(a), (b), and (c), and an alleged conspiracy to violate RICO as prohibited in 18 U.S.C. § 1962(d). The Eighth Circuit rejected these arguments, reversed the district court's ruling, and ordered that the district court grant the motion to dismiss. The Eighth Circuit held that Bowman lacked standing to assert a RICO claim. Bowman, 985 F.2d at 384

This Court agrees that, under Bowman, the present Plaintiffs lack standing to assert a RICO claim against RPR or Dr. Turpie. As noted, the parties to this action have stipulated "[s]hould the Court grant defendants RPR's and Turpie's Motions to Dismiss, the decision shall apply equally to defendant Becker." [Docket No. 19]. Consequently, the Court finds that Plaintiffs are also without standing to assert a RICO claim against Defendant Becker. The District Court should further find that Plaintiffs are without standing to assert RICO claims against Defendants "Does 1 through 100."

In Bowman, the Eighth Circuit first noted the unanimity among the circuit courts that a person alleging employment injury because of a refusal to participate in an employees alleged racketeering activity has no standing to assert substantive RICO claims under 18 U.S.C. § 1962(a)-(c). Bowman, 985 F.2d at 385. The court then held:

> "The simple act of discharging an employee as alleged in this case does not constitute racketeering activity as defined in RICO, and thus does not fall within the definition of what the Supreme Court has termed 'predicate acts' under RICO. Accordingly, as a matter of law, Bowman lacks standing to bring a 'whistle blower' wrongful discharge suit under 18 U.S.C. § 1964(c) when the underlying RICO violation is based on § 1962(a), (b), or (c)."

Bowman, 985 F.2d at 385-86.

The Bowman court next addressed the 18 U.S.C. § 1962(d) conspiracy claim brought by Bowman, who contended that he suffered injury to his business or property as a result of a conspiracy on the part of Western Auto to violate RICO. Bowman, 985 F.2d at 386. After acknowledging a circuit split "as to the requirements that must be met to establish standing to bring a civil suit when the underlying violation is an alleged § 1962(d) RICO conspiracy claim," the Bowman court ruled that "[i]mposing the predicate act requirement on civil claims based on violations of § 1962(d) narrows the focus of those suits to the specific racketeering activity that lies at the heart of the RICO statute." Id. at 386, 388. The Bowman court explicitly ruled:

> "We hold that standing to bring a civil suit pursuant to 18 U.S.C. § 1964(c) and based on an underlying conspiracy violation of 18 U.S.C. § 1962(d) is limited to those individuals who have been harmed by a § 1961(1) RICO predicate act committed in furtherance of a conspiracy to violate RICO. Because Bowman, who contends that he was fired for protesting, speaking out against, and criticizing Western Auto's alleged double billing scheme, has not alleged such an injury, he lacks standing to bring this civil RICO action."

Bowman, 985 F.2d at 388. In holding that Bowman lacked standing to bring any civil RICO claim, the Eighth Circuit specifically relied on the Supreme Court's decision in Holmes. Bowman, 985 F.2d at 388.

To support their RICO claims, Plaintiffs rely solely on their allegation that, "in furtherance of Defendants' conspiracies," RPR has "damaged the business reputation of

Plaintiffs in the pharmaceutical industry." Second Amended Complaint ¶ 51. Plaintiffs defamation allegations in the Second Amended Complaint are largely boilerplate in form. Plaintiffs merely allege that they have been "defamed" and have suffered "damages to their business reputation" or "their business or property." Id. at ¶¶ 15, 51, 62, 64. The only specific allegation that Plaintiffs make in the Second Amended Complaint is that they were defamed for "refusing to participate in the illegal promotion of Off-Label usage of [RPR] products and kickbacks to parties committing to use of its products." Id. at ¶ 13. As noted earlier, Plaintiffs' counsel stated at oral argument that Plaintiffs' were not defamed for their refusal to participate in these activities, but were defamed because of their actual participation in Defendants' alleged fraudulent scheme, an allegation totally absent from the Second Amended Complaint. In light of this statement, and the plain reading of the Second Amended Complaint, there are no allegations which are sufficient to support a RICO claim.

At oral argument, Plaintiffs' counsel alleged that Plaintiffs actually participated in the alleged illegal activity of RPR, and that a defamation claim giving rise to a RICO claim is cognizable because of that participation. Plaintiffs' counsel delineated the particular ways in which each of the four individual Plaintiffs were allegedly defamed. Plaintiffs' counsel asserted that the business reputations of the two sales representatives, Hamm and Bohm, were damaged by virtue of their being used as "pawns" in Defendants' alleged fraudulent scheme, because third parties rely upon those reputations when dealing with them. Plaintiffs' counsel asserted that DeCembrino's and Conolly's reputations were also damaged by RPR employees, who allegedly advised DeCembrino and Conolly to ignore the law. DeCembrino allegedly reviewed and approved requests for payments on promotional activities submitted by the sales representatives and Genecom and

brought questionable requests to the attention of in-house legal counsel at RPR. Conolly, DeCembrino's subordinate, allegedly reviewed such requests too and brought questionable ones to the attention of DeCembrino or in-house counsel and forwarded requests to DeCembrino for approval. In addition, DeCembrino and Conolly allegedly will have to defame themselves through self-publication when looking for new jobs, because they will have to admit on employment applications that they violated federal law.

Even if Plaintiffs were permitted to amend their Second Amended Complaint to make the new allegations raised by Plaintiffs' counsel, such an amendment would be futile. First, although Plaintiffs allege that Defendants committed several predicate acts, any reputational injuries alleged suffered by Plaintiffs were not the direct result of those predicate acts since Plaintiffs were not the defrauded party or otherwise a target of the alleged unlawful acts. Baglio v. Baska, 940 F. Supp. 819, 834-35 (W.D. Pa. 1996), aff'd, 116 F.3d 467 (3d Cir. 1997); In re American Express Co. Shareholder Litigation, 39 F.3d 395, 399-401 (2d Cir. 1994); Cullom v. Hibernia Nat'l Bank, 859 F.2d 1211, 1218 (5th Cir. 1988); Tarr v. Credit Suisse Asset Management, Inc., 958 F. Supp. 785, 802 (E.D.N.Y. 1997); Hoydal v. Prime Opportunities, Inc., 856 F. Supp. 327, 329 (E.D. Mich. 1994). Therefore, Plaintiffs could not show the required casual link between the alleged injury and RPR's alleged RICO violations. Willis v. Lipton, 947 F.2d 998 (1st Cir. 1991); Kramer v. Bachan Aerospace Corp., 912 F.2d 151, 154-56 (6th Cir. 1990); Hecht v. Commerce Clearing House, Inc., 897 F.2d 21 (2d Cir. 1990); Manson v. Stacescu, 823 F. Supp. 76, 81-82 (D. Conn.), aff'd, 11 F.3d 1127 (2d Cir. 1993), cert. denied, 513 U.S. 915 (1994); Bennett v. Centerpoint Bank, 761 F. Supp. 908, 913-17 (D. N.H.), aff'd, 953 F.2d 634 (1st Cir. 1991); Mitchell v. Biomagnetic Resonance, Inc., 1997 WL 259367 *5 (6th Cir. May 15, 1997) (unpublished op.).

Second, the RICO statute only permits a civil litigant to recover for injury to his or her "business or property." 18 U.S.C. § 1964(c). Harm to one's reputation does not fall within that rubric. City of Chicago Heights, Illinois v. Lobue, 914 F. Supp. 279, 285 (N.D. Ill. 1996); Vitone v. Metropolitan Life Ins. Co., 943 F. Supp. 192, 199-200 (D. R.I. 1996); In re Teledyne Defense Contracting Derivative Litigation, 849 F. Supp. 1369, 1372 n.1 (C.D. Cal. 1993); Rodriguez v. Llorens Quinones, 813 F. Supp. 924, 929 (D. P.R. 1993); John Paul Mitchell Systems v. Eslami, 1997 WL 143947 *3 (9th Cir. Mar. 26. 1997) (unpublished op.). In short, damage to reputation of this sort is not a compensable RICO injury. If such allegations were sufficient, there would be no employee who would be unable to make such a claim, because any employee that belongs to a company that violates one of RICO's substantive provisions--from the Chief Executive Officer to the mailroom employee who opens the mail--could potentially suffer some reputation damage merely by virtue of the fact that he or she works at the company and could be perceived, rightly or wrongly, to be involved with those unlawful acts.

Finally, the Court is not persuaded that RICO was intended to permit persons participating in a fraudulent scheme in violation of RICO to then turn seek treble damages of any sort under RICO. The Court also fails to see how Plaintiffs could even be defamed in the first place based on the allegation that they actually participated in the alleged fraudulent conduct, since truth is a defense to a defamation claim.

Plaintiffs depend heavily on the Eighth Circuit's vacated decision in Alexander Grant to support their position that damage to someone's business reputation is a cognizable RICO injury. In that case, the Eighth Circuit ruled, both initially and on remand, that an accounting firm had standing to assert a RICO claim on the basis of allegations that its

client fraudulently induced it to provide an inaccurate audit. The accounting firm claimed that it was the target of a pervasive scheme of mail and wire fraud designed by the defendants to obtain a favorable audit, and that it had suffered damages to its business reputation as a result of that scheme. Alexander Grant & Co. v. Tiffany Industries, 742 F.2d 408 (8th Cir. 1984), vacated, 473 U.S. 922 (1985), on remand, 770 F.2d 717 (8th Cir. 1985), cert. denied, 474 U.S. 1058 (1986). However, in deciding that the accounting firm could proceed with its RICO claim, the Alexander Grant court expressly rejected the argument that a distinction should be drawn between "direct" and "indirect" injuries, a distinction now compelled by Holmes. The Alexander Grant case is also distinguishable from the present case in that the accounting firm in Alexander Grant was the target of the alleged fraud. Here, Plaintiffs were not the target of the alleged fraudulent conduct and Plaintiffs' counsel in fact conceded this point at oral argument. The case of Handeen v. Lemaire, 112 F.3d 1339 (8th Cir. 1997), the other decision relied upon by Plaintiffs, is also distinguishable on that basis.

Because the Court has recommended that Plaintiffs' Second Amended Complaint be dismissed for Plaintiffs' lack of standing, the Court need not address the other arguments raised by Defendants.

II. Dismissal of RICO Claims With Prejudice

The Court must decide whether the dismissal of Plaintiffs' Second Amended Complaint should be with or without prejudice. Ordinarily, a pleading dismissed pursuant to Rule 12 should be dismissed without prejudice. Frey v. City of Herculaneum, 44 F.3d 667, 672 (8th Cir. 1995); Huelsman v. Civic Center Corp., 873 F.2d 1171, 1176 (8th Cir. 1989). Dismissal with prejudice should be used sparingly because it is a drastic sanction. Omaha Indian Tribe v. Tract

I--Blackbird Bend Area, 933 F.2d 1462, 1468 (8th Cir.), cert. denied, 502 U.S. 942 (1991); Welsh v. Automatic Poultry Feeder Co., 439 F.2d 95, 96 (8th Cir. 1971). "An action should be dismissed with prejudice 'only after balancing the policy of giving the plaintiff her day in court against [the] policies of preventing undue delay, avoiding court congestion, and preserving respect for court procedures.'" Omaha Indian Tribe, 933 F.2d at 1468 (quoting Garrison v. International Paper Co., 714 F.2d 757, 760 (8th Cir. 1983)). In striking this balance, all the facts and circumstances of the case must be considered. Garrison, 714 F.2d at 760.

There are strong reasons warranting dismissal with prejudice in this case. A litigant has a duty to draft its complaint in compliance with the applicable Rules. When a plaintiff is presented with a motion to dismiss, the party must choose whether to voluntarily seek to amend its complaint, or to stand on the complaint and proceed on the basis of the complaint as originally drafted. If a party may always have an opportunity to submit an amended complaint if it is determined that its initial complaint does not meet the requirements of the Federal Rules of Civil Procedure, that party will have little incentive voluntarily to comply with the requirements at the pleading stage. The party will not even have an incentive to acknowledge its error when a motion to dismiss is filed, subjecting courts and the parties to additional burden and expense, which may be avoided. See In re Buffets, Inc., 906 F. Supp. 1293, 1301 (D. Minn. 1995).

As one commentator aptly describes, motions to dismiss are integral "pretrial interception/discouragement mechanisms." Louis, Martin B., Interception and Discouraging Doubtful Litigation: A Golden Anniversary View of Pleading, Summary Judgment, and Rule 11 Sanctions Under the Federal Rules of Civil Procedure, 67 No. Car. L. Rev. 1023, 1033 (1989). The "pretrial interception/ discouragement mechanism" of Rule 12 is well served by

requiring a party to set forth its claims clearly, as is indeed required by Rule 8. Where the allegations are clear, the parties themselves may ascertain whether discovery requests are reasonably related to the issues in the litigation and parties are better able to focus the issues for presentation to the court on dismissal motions. Requiring clarity in pleadings also serves to enhance the self-policing features embodied in Rule 11, since it then may more easily be seen whether the requirements of Rule 11 have been met. In re Buffets, 906 F. Supp. at 1298.

Because Plaintiffs have already had three opportunities to plead facially valid RICO claims, this Court recommends that Plaintiffs' RICO claims be dismissed with prejudice. See Cygnus Therapeutic Systems v. ALZA Corp., 1995 WL 312093 (N.D. Cal. May 17, 1995) (unpublished op.) (defendant's motion to dismiss granted with prejudice where plaintiff "has already had one opportunity to amend its complaint"), aff'd, 92 F.3d 1153 (Fed. Cir. 1996); Veal v. Memorial Hospital of Washington County, 894 F. Supp. 448 (M.D. Ga. 1995) (plaintiff would not be allowed to amend her complaint where plaintiff had already had an opportunity to amend her complaint); Tosta v. Williams, 1987 WL 17233 at *6 (E.D. Pa. Sept. 16, 1987) (unpublished op.) ("Plaintiff is a licensed attorney and the court has given her adequate opportunity to amend her complaint to allege the requisite underlying facts for a § 1983 action. Accordingly, all defendants' motions to dismiss are granted and the plaintiff's amended complaint is dismissed with prejudice.").

Plaintiffs' RICO claims should be dismissed with prejudice for the additional reason that it would be futile for Plaintiffs to amend their RICO claims. In re American Express Co. Shareholder Litigation, 39 F.3d at 402 (where complaint was amended twice before it was dismissed, district court did not abuse its discretion in refusing to grant leave to amend because the amendment would be futile in light of

appellant's inability to assert a RICO claim); Reddy v. Litton Industries, Inc., 912 F.2d 291, 297 (9th Cir. 1990) ("[T]he district court's ruling that Reddy's RICO claim should be dismissed with prejudice was not an abuse of discretion because amendment would not cure the deficiencies in the complaint."), cert. denied, 502 U.S. 921 (1991). It is well settled that, although a pretrial motion for leave to amend is normally liberally granted, courts need not allow amendments to pleadings if the amendment would be "futile." Foman v. Davis, 371 U.S. 178, 182 (1962); Harbor Ins. Co. v. Essman, 918 F.2d 734. 739 (8th Cir. 1990). In light of the controlling decision in Bowman and for the reasons outlined above, Plaintiffs will not be able to allege any set of facts giving them standing to assert RICO claims. It would therefore be futile to permit Plaintiffs to amend their Second Amended Complaint.

III. The State Law Claims Should Be Dismissed Without Prejudice

Having determined that Plaintiffs' RICO claims should be dismissed, the Court must next determine whether to exercise supplemental jurisdiction in this matter. The old doctrine of "pendent jurisdiction" is replaced by the 1990 Congressional action adopting 28 U.S.C. § 1367. The Judicial Improvements Act of 1990 codified the former common law doctrines of pendent and ancillary jurisdiction under the new rubric of supplemental jurisdiction. Willman v. Heartland Hospital East, 34 F.3d 605, 613 (8th Cir. 1994), cert. denied, 514 U.S. 1018 (1995). Specifically applicable in this instance are the provisions of subdivision (c)(3):

> "(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if -- . . . (3) the district court has

dismissed all claims over which it had original jurisdiction."

28 U.S.C. § 1367(c)(3).

Under the facts of this case, there seems little doubt that it would be appropriate to decline to exercise supplemental jurisdiction of the remaining state law claims. Plaintiffs' defective RICO claims are the only asserted bases for the exercise of federal jurisdiction, and the state law claims are only before the Court by operation of supplemental Jurisdiction. The plain language of 28 U.S.C. § 1367(c)(3) gives this Court discretion to decline to exercise supplemental jurisdiction over the remaining state law claims, and the Court finds that, in the exercise of that discretion, Plaintiffs' state law claims should be dismissed for lack of subject matter jurisdiction. 28 U.S.C. § 1367(c)(3); accord United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966); Brennan v. Chestnut, 777 F. Supp. 1469, 1475 (D. Minn. 1991), aff'd, 973 F.2d 644 (8th Cir. 1992). Plaintiffs' counsel concedes that, in the absence of a viable RICO claim, Plaintiffs' state law claims should be tried in state court. The dismissal of Plaintiffs' state law claims, however, should be without prejudice. Haviland v. J. Aron & Co., 796 F. Supp. 95, 102 (S.D.N.Y.), aff'd, 986 F.2d 499 (2d Cir. 1992), cert. denied, 507 U.S. 1051 (1993).

IV. Effect of Rule 23(e) of the Federal Rules of Civil Procedure

Because Plaintiffs styled their Complaint as a "Class Action," this Court must determine the effect, if any, that Rule 23(e) of the Federal Rules of Civil Procedure has on Defendants' Motions to Dismiss. Rule 23(e) provides that "[a] class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed

dismissal or compromise shall be given to all members of the class in such manner as the court directs." Fed. R. Civ. P. 23(e). "The purposes of Rule 23(e) are to discourage the use of the class action device to secure an unjust private settlement, and to protect the absent class members against prejudice from discontinuance." 3 H. Newberg, Class Actions § 4910, at 402 (1977); see also Simer v. Rios, 661 F.2d 655 (7th Cir. 1981) (policies of Rule 23(e) include protection of absent class members from res judicata judgment and other prejudicial effects of settlement or dismissal), cert. denied, 456 U.S. 917 (1982).

The law is unclear as to whether Rule 23(e) applies when an action of the named plaintiffs is dismissed prior to the class certification hearing. See Rice v. Ford Motor Co., 88 F.3d 914 (11th Cir. 1996) ("In this Circuit, the applicability of Rule 23(e) to proposed classes prior to their certification is an open question."). Most courts that have considered the question have determined that Rule 23(e) applies in the pre-certification context. Diaz v. Trust Territory of the Pacific Islands, 876 F.2d 1401, 1408 (9th Cir. 1989) ("We . . . adopt the majority approach and hold that Rule 23(e) applies before certification."); Kahan v. Rosenstiel, 424 F.2d 161, 169 (3d Cir.) ("a suit brought as a class action should be treated as such for purposes of dismissal or compromise, until there is a full determination that the class action is not proper"), cert. denied, 398 U.S. 950 (1970); accord Glidden v. Chromalloy American Corp., 808 F.2d 621, 626 (7th Cir. 1986); Larkin General Hospital, Ltd. v. American Telephone & Telegraph Co., 93 F.R.D. 497 (E.D. Pa. 1982). However, other courts have reached the opposite conclusion. Shelton v. Pargo, 582 F.2d 1298 (4th Cir. 1978) (Rule 23(e) does not apply prior to class certification).

This Court does not need to resolve this legal question, because courts have consistently held that notice is not required under Rule 23(e) when the dismissal is involuntary.

See Diaz, 876 F.2d at 1406; Brooks v. State Board of Elections, 173 F.R.D. 552, 554 (S.D. Ga. 1997); Austin v. Pennsylvania Dep't of Corrections, 876 F. Supp. 1437, 1455 (E.D. Pa. 1995); Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., 677 F. Supp. 289, 294-95 (M.D. Pa. 1987); Laventhall v. General Dynamics Corp., 91 F.R.D. 208, 210 (E.D. Mo. 1981), aff'd, 704 F.2d 407 (8th Cir.), cert. denied, 464 U.S. 846 (1983); Robinson v. First Nat'l City Bank, 482 F. Supp. 92, 100 n.17 (S.D.N.Y. 1979); Burgener v. California Adult Authority, 407 F. Supp. 555, 560 (N.D. Cal. 1976). In light of this legal authority, no notice of the dismissal needs to be given to any alleged unnamed class members.

RECOMMENDATION

Based upon all of the files, records, and proceedings herein,

IT IS HEREBY RECOMMENDED THAT:

1. The Motion of Defendant Rhône-Poulenc Rorer Pharmaceuticals Inc. to Dismiss Plaintiffs' Second Amended Complaint [Docket No. 61 and the Motion of Alexander Graham Turpie to Dismiss Plaintiffs' Second Amended Complaint [Docket No. 10(1)] be granted.

2. The RICO claims asserted against Defendants Rhône-Poulenc Rorer Pharmaceuticals Inc., Alexander Graham Turpie, Robert A. Becker, Inc. and "Does 1 through 100" in Counts I and II of Plaintiffs' Second Amended Complaint be dismissed with prejudice.

3. The remaining state law claims asserted against Defendant Rhône-Poulenc Rorer Pharmaceuticals Inc. in Counts III through X of Plaintiffs' Second Amended Complaint be dismissed without prejudice.

4. The Motion of Alexander Graham Turpie for Costs and Attorney Fees [Docket No. 10(2)] be denied.

Dated: September 18, 1997.

/s/
JOHN M. MASON
United States Magistrate Judge

Pursuant to Local Rule 72.1 (c)(2), any party may object to this Report and Recommendation by filing with the Clerk of Court, and by serving upon all parties by October 3, 1997, written objections which specifically identify the portions of the Report to which objections are made and the bases for each objection.

Unless the parties stipulate that the District Court is not required by 28 U.S.C. § 636 to review a transcript of the hearing in order to resolve all objections made to this Report and Recommendation, the party making the objections shall timely order and file a complete transcript of the hearing by October 3, 1997.

Racketeer Influenced and Corrupt Organizations

18 U.S.C. §§ 1962(c) and (d)

§1962. Prohibited activities

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

UNITED STATES DISTRICT COURT **EXHIBIT**
DISTRICT OF MINNESOTA
FOURTH DIVISION

John Hamm, et al., Plaintiffs, vs. Rhône-Poulenc Rorer Pharmaceutical Inc., et al., Defendants.	Ct. File No. 97-1329 DSD/JMM **Jury Trial Demanded** **Proposed Second Amended Complaint** **Class Action For Violation of the Racketeer Influence and Corrupt Organizations Act and State Law**

Plaintiffs, by their attorneys, Messerli & Kramer P.A., bring this action seeking relief from the unlawful practices of Defendants, state and allege as follows:

SUMMARY OF COMPLAINT

This is a class action Complaint pursuant to Federal Rules of Civil Procedure 23 on behalf of present and former employees of Rhone-Poulenc Rorer Pharmaceutical Inc., (hereinafter "RPRP" or the "Company"), a Delaware corporation and Robert A. Becker, Inc., a New York corporation which is an advertising agency (hereinafter "Becker"), and numerous named and unnamed physicians who together with the named Defendants conspired to profit from

the illegal promotion and sale of RPRP products for non-indicated applications or prior to Food and Drug Administration ("FDA") approval of drugs for intended therapeutic applications. RPRP is a subsidiary of Rhone-Poulenc Rorer Inc., which is a multibillion dollar corporation publicly traded on the New York Stock Exchange with over 6,700 shareholders and over 28,000 employees worldwide. Corporate demand for increased sales resulted in RPRP encouraging illegal promotion of Lovenox to generate substantial profits from sales of non-indicated applications. Some of these uses were considered the subject of application for future indications or were experimental in nature with no currently filed application for approval from the FDA. In the case of Lovenox, RPRP recognized that sales from non-approved usage could far exceed sales for approved indications. Once the FDA has approved a drug's usage, its indicated usage is described in the package insert. The package insert provides information about the drug's use, including indications, effects, dosages, routes, methods and frequency and duration of administration and any relevant hazards, contra-indications, side effects and precautions concerning the safe use and purposes for which it is intended. However, physicians may prescribe the drug for use in a manner not indicated in the package insert ("Off-Label"). Under U.S. Statutes and FDA regulations, a manufacturer is prohibited from promoting such Off-Label use. RPRP has disregarded the U.S. Statutes and Federal Regulations and implemented a program to train its sales representatives to contact physicians directly to promote Off-Label sales. In May of 1996, the Company determined a need to be more circuitous in its Off-Label promotions and conspired with Becker to employ a separate enterprise known as Genecom to funnel illegal payments to a select group of physicians known to promote Off-Label use of RPRP drugs. Despite numerous protests by Plaintiffs as to the illegality of this conduct, Defendants expanded their Off-Label promotions

and continued to pay kickbacks to physicians who would commit to prescribe RPRP drugs for both approved indications and Off-Label uses. To drive these illegal promotions, RPRP established sales goals and budgets far in excess of any realistic sales estimates for approved uses and coerced sales representatives to solicit grant requests from medical institutions and arranged for speaking engagements by a select group of physicians known to strongly promote Off-Label uses. These schemes laundered profits from illegal Off-Label promotions through third parties, such as Genecom, back to physicians who would promote Off-Label use of the drugs, thus expanding Off-Label sales of RPRP products. These illegal schemes provided hundreds of millions of dollars of profit to RPRP as a direct result of Off-Label promotions of Lovenox. Plaintiffs and other members of the intended class, despite their repeated protests, were coerced to expand Off-Label promotions, make kickback payments, destroy evidence of Off-Label promotions, and fabricate documentation to cloak the Company's money laundering schemes. Those who became more assertive were subjected to harassment, constructively discharged, denied promotional opportunities, denied compensation, and subjected to defamation and potential criminal exposure which has damaged their business reputation and livelihood.

JURISDICTION AND VENUE

1. The subject matter jurisdiction of the Court over this action is based upon § 1964(c) of RICO, 18 U.S.C. § 1964(c), 28 U.S.C. § 1331, 28 U.S.C. 1367, and principles of pendant jurisdiction. This Court has personal jurisdiction over each of the Defendants pursuant to, *inter alia*, § 1965(b) of RICO, 18 U.S.C. § 1965(b).

2. Venue over this action is proper in this district pursuant to, *inter alia*, § 1965(a) of RICO, 18 U.S.C. § 1965(a) and 28 U.S.C. § 1391(b).

3. As set forth in greater detail below, in connection with the acts, conduct, combination and conspiracy alleged herein, the Defendants and their co-conspirators, directly and indirectly, have used the means and instrumentalities of interstate and foreign commerce, including travel in interstate and foreign commerce, use of the United States mails and interstate and international wire facilities. Many of these acts, occurred within this district.

THE PARTIES

4. Plaintiff John Hamm, ("Hamm") is a citizen of the United States of America, residing in Karnack, Texas, and at all times material was employed as a Sales Representative of Defendant RPRP.

5. Plaintiff Linda Conolly, ("Conolly") is a citizen of the United States of America, residing in Telford, Pennsylvania, and at all times material was employed as either a Data Entry Clerk, Promotional Literature Coordinator, or Promotional Event Coordinator at the corporate Headquarters in Collegeville, PA.

6. Plaintiff Elaine DeCembrino ("DeCembrino") is a citizen of the United States of America, residing in Chalfort, Pennsylvania, and at all times material was employed as a Supervisor of Budget and Promotion at RPRP's Headquarters in Collegeville, PA.

7. Plaintiff Kelly Bohm ("Bohm") is a citizen of the United States of America, residing in Baltimore, Maryland, and at all times material was employed as a Sales Representative of RPRP.

8. Defendant RPRP is a corporation organized under the laws of the state of Delaware, and is a manufacturer of

prescription pharmaceutical and over-the-counter drugs distributed world wide including the state of Minnesota and employs sales representatives to illegally promote its products within the state of Minnesota.

9. Prior to introduction of drugs into the market place the Company must obtain FDA approval which establishes the approved uses of the drug to be indicated on the label ("indications"). Important brand names which RPRP manufactures and sells are: Lovenox, which has obtained FDA approval for prevention of deep-vein thrombosis ("DVT") after total knee replacement and/or total hip replacement; Taxotere which has FDA approval for use in metastatic breast cancer; Azmacort, which has FDA approval for treatment of inflammation of lungs; Nasacort AQ, which has FDA approval as a nasal steroid.

10. Defendant, Robert A. Becker, Inc., ("Becker") is a closely held New York corporation with its principal place of business in New York, New York. It also operates under the fictitious name Genecom.

11. Defendant, Alexander Graham Turpie, M.D., is a citizen of Canada, residing in the city of Hamilton, Province of Ontario. As agent and co-conspirator with Defendant RPRP and Becker, Dr. Turpie has transacted business throughout the United States including the district of Minnesota.

12. Except as described herein, the true names of the Defendants sued as Does 1 through 100, inclusive, are unknown to Plaintiffs and therefore sued these Defendants by such fictitious names. Plaintiffs will seek leave of the Court to amend this Complaint to allege their true names and capacities when ascertained. These fictitiously named Defendants are the officers, managing directors, legal counsel, other members of management, physician speakers, and other advisors who were involved in the design, implementation, and approval of the transactions complained of herein or who received the benefit from these transactions. These Defendants aided and abetted,

or participated with, RPRP and Becker in the wrongful acts and course of conduct, or otherwise caused the damages sought herein and are responsible for the acts, occurrences and events alleged in this Complaint.

CLASS ACTION ALLEGATIONS

13. Plaintiffs bring the claims for relief asserted herein as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure and on behalf of a class (hereinafter the "Class") consisting of all persons employed by RPRP, who have: been terminated, denied promotional opportunities, denied compensation rewards, lost stock option plans, deprived of pension benefits and subjected to intimidation and harassment, and defamed for either refusing to participate in the illegal promotion of Off-Label usage of RPRP products and kickbacks to parties committing to use of its products.

14. The exact number of class members can be determined from RPRP's personnel and employment records. Plaintiffs believe the class consists of at least several hundred present and former employees. Therefore, the members of the Class are so numerous that joinder of all members is impracticable.

15. Plaintiffs' claims are typical of the claims of the Class members because they, and all members of the Class, have sustained and will sustain damages to their business reputation, subjected to federal sanctions, and have lost earnings as a result of Defendants' wrongful conduct, as alleged herein.

16. Plaintiffs will fairly and adequately protect and represent the interest of the members of the Class and have retained counsel competent and experienced in class action litigation. Plaintiffs are members of the Class and their claims are typical of the claims of the other Class members; moreover, Plaintiffs do not have any interests antagonistic to, or in conflict, with the members of the Class.

17. The Class action is superior to all other available methods for the fair and efficient adjudication of this controversy. Because the damages sustained by some individual Class members may be small, albeit significant, the expense and burden of individual litigation makes it impracticable for all Class members to individually seek redress for the wrongful conduct alleged herein. Absent Class action Defendants will likely retain the benefits of their wrongdoing.

18. Defendants have acted, and continue to act, in a wrongful manner which affects the class as a whole making final injunctive relief appropriate with respect to the class pursuant to F.R.C.P. 23(b)(3).

19. Common questions of law and fact exist as to all members of the class and predominate over any questions affecting only individual members of the class pursuant to F.R.C.P. 23(b)(3). Among the questions of law and fact common to the Class are:

(a) Whether Defendants participated in and pursued the wrongful concerted actions complained of herein;
(b) Whether RICO was violated by Defendants acting as alleged herein;
(c) Whether the members of the Class have sustained damages and, if so, the proper measure of damages.

ALLEGATIONS OF WRONGDOING

20. The Food, Drug and Cosmetic Act 21 U.S.C. § 301 et seq. restricts a manufacturer's promotion of its product to those uses indicated on its FDA approved label. 21 C.F.R. 202.1(e)(4)(i)(a), (ii) and (iii); 21 C.F.R. 202.1(e)(6)(i) and (xi); 21 C.F.R. 201.128.

21. Once the FDA approves a drug, physicians may prescribe the drug for use, or in a manner, not indicated on its

FDA approved label ("Off-Label"). However, a manufacturer is prohibited from promoting such Off-Label use.

22. Defendants conspired to illegally promote the use of RPRP product prior to FDA approval or for off-label use with the intent to defraud hospital administrators, physicians, and other medical personal into prescribing or purchasing RPRP products.

23. The Defendants conspired to illegally promote the use of RPRP products prior to FDA approval or for Off-label use under the false pretence that the monetary grants provided by RPRP were unrestricted.

24. In fact, the grant programs of RPRP, which Defendant Turpie and Becker participated in, were conditional upon select speakers and other materials intended to promote Off-label use of RPRP products.

25. Defendants (and others acting in concert with them) have conducted or participated, directly or indirectly, in a pattern of racketeering activity. The pattern includes the following predicated acts (together with other predicated acts and unlawful schemes not yet known to Plaintiff, each of which occurred within the last ten (10) years). Defendants devised schemes to obtain money from the illegal promotions of RPRP products by means of false pretenses through a third-party administration program known as "Genecom" in violation of 18 U.S.C. § 1314.

26. To effectuate and implement their illegal schemes, Defendants sent promotional materials and obtained or issued payment of money through the U.S. mail in violation of 18 U.S.C. § 1341.

27. To effectuate and implement their illegal schemes, Defendants transmitted promotional materials and made false representations by interstate telephonic communications in violation of 18 U.S.C. § 1343.

28. To effectuate and implement their illegal schemes, Defendants used the facilities of interstate commerce, including

the mail with the intent to distribute the proceeds gained from illegal kickbacks and payments made to influence the promotion and use of RPRP products in violation of 18 U.S.C. § 1952 (1).

29. Defendants used interstate commerce including the United States mail, with the intent to facilitate the promotion, management, establishment and carrying on of the unlawful activity of kickbacks and illegal influencing of the sale and use of RPRP products in violation of 18 U.S.C. 1952 (3).

A. *Off-Label Promotion of Lovenox.*

30. In 1995 Hamm was induced to leave other employment to accept a position with RPRP based on their commission structure.

31. In 1995, at a sales training seminar, Hamm and other new RPRP hospital sales representatives were trained by RPRP on Off-Label uses of Lovenox. In addition, he was instructed to make direct solicitations with physicians who would prescribe Lovenox for Off-Label use: in trauma, cardiology, stroke treatment of established DVT and other areas of therapeutic treatment.

32. In May 1996, after complaints and FDA investigations regarding Off-Label promotions, RPRP concocted the illegal scheme to promote Off-Label sales through the conduit enterprise Genecom, is a division of Becker. Technically, the Genecom program was established to field requests for unrestricted grants from medical institutions.

33. In fact, sales representatives were trained and instructed to solicit the request for unrestricted grants. from physicians practicing in areas outside of Lovenox's indicated use.

34. The sales representative would then arrange for a speaker from a short list of physicians known to promote Off-

Label uses of Lovenox. Off-Label Lovenox protocols were broadly distributed by area managers.

35. Despite protest from the sales representatives, RPRP continued to require promotion of Off-Label uses on a nation-wide basis, including the state of Minnesota, and established sales criteria which required Off-Label promotion in order to achieve commission bonuses and maintain employment on advancement in the corporation.

36. Specific quotas of the Off-Label Genecom programs were required by management.

37. In 1996, Lovenox achieved $150,000,000 of sales of which $60,000,000 were from prescriptions for indicated uses and another $90,000,000 sales from Off-Label use. Evidence of their continued efforts to promote Off-Label uses is the fact that the budgeted sales of Lovenox for 1997 are $205,000,000. This inflated sales level cannot be attained without Off-Label promotions. The total orthopedic market for Lovenox' indicated uses is significantly less than $205,000,000.

38. Defendants RPRP and Becker, through a pattern of racketeering activity and association in fact have employed the enterprise Genecom as a conduit for illegal payments to speakers associating with Genecom and Defendants who will promote Off-Label use of Lovenox as evidenced by the following transactions, each of which was effectuated by use of the United States mail and telephonic communications:

(a) Genecom contracted with Dr. Alexander Graham Turpie ("Turpie") for a speaking engagement which occurred on January 8, 1996, at the Vascor Institute for Rehabilitation, Dallas, Texas, for the primary purpose of marketing the Off-Label use of Lovenox on spinal cord injuries, stroke and trauma. Turpie was paid $250.00 indirectly by RPRP to promote these Off-Label uses as evidenced by payment request number 20778.

(b) Genecom contracted with Turpie for a speaking engagement conducted on January 25, 1996, at UTMB-Galveston in Galveston, Texas for the purpose of promoting the Off-Label use of Lovenox in the treatment for stroke, spinal cord injuries, trauma, and cardiovascular conditions. Turpie was paid an honorarium of $1,000.00 to promote the Off-Label use of Lovenox as evidenced by payment request no. 098679.

(c) Turpie was engaged by Genecom for a speaking engagement on February 20, 1996, at Peppins on the Water, in Port Charlotte, Florida. Turpie was paid a $1,000.00 honorarium and reimbursed $6,346.00 in expenses as evidenced by payment request no. 071749.

(d) RPRP through Genecom contracted Turpie for a speaking engagement held on May 12, 1995, at the Sixth Annual Orthopedic Rehabilitation Association in Denver, Colorado to be followed by a tour of Craig Hospital with the intent of promoting the Off-Label use of Lovenox for spinal cord injuries. Turpie was paid $500.00 by RPRP as evidenced by payment request no. 090016.

(e) RPRP through Genecom solicited the Arizona Heart Institute Foundation to request an educational grant of $1,500.00 which subsequently engaged Turpie for a lecture on November 9, 1995, at the Arizona Heart Institute, Phoenix, Arizona. Turpie was paid $1,500.00 to promote Off-Label use of Lovenox as evidenced by payment request no. 151123.

(f) Turpie was engaged for a speaking event on January 24, 1996, at UTMB-Galveston, Galveston, Texas for the primary purpose to educate the attending physicians on Off-Label use of Lovenox in various cardiovascular procedures. Turpie was paid $2,000.00 and reimbursed $1,000.00 travel expense to promote Off-Label use of Lovenox as evidenced by payment request no. 096497.

(g) Turpie was engaged to conduct a telephonic conference on March 6, 1996, with Moses Love Hospital, Greensboro, North Carolina and paid an honorarium of $200.00 to promote Off-Label use of Lovenox for treatment of stroke as evidenced by payment request no. 215338.

(h) Turpie was engaged for a speaking engagement conducted on April 2, 1996, at Fort Saunders Regional Medical Center, Knoxville, Tennessee and was paid a $500.00 honorarium together with reimbursement of $200.00 in expenses to educate pharmacists on Off-Label uses of Lovenox as treatment for stroke, as evidenced by payment request no. 096278.

(i) Turpie was engaged for a speaking engagement on February 16, 1995, at Methodist Hospital, South Lake Campus, Merrillville, Indiana and paid an honorarium of $1,000.00 and reimbursed $500.00 in expenses to promote Off-Label use of Lovenox as evidenced by payment request no. 207879.

(j) Turpie was engaged for a speaking engagement conducted on May 6, 1996, at the Denver Cardiac Surgery, Denver, Colorado to promote continued use of Lovenox during cardiac surgery which is a non-indicated use as evidenced by payment request no. 113703.

(k) Turpie was engaged for a speaking engagement conducted on May 13, 1996, and paid an honorarium of $1,000.00 and reimbursed $500.00 in travel expenses to promote current and future use of Lovenox Off-Label as evidenced by payment request no. 207893.

(l) Turpie was engaged for a speaking engagement held on May 14, 1996, at LaGrange Hospital, LaGrange, Illinois and paid an honorarium of $1,000.00 and reimbursed $500.00 in travel expense to promote the future use of Lovenox prior to FDA approved indication as evidenced by payment request no. 096161.

(m) Turpie was engaged for an event held on January 10, 1996, at Mount Sinai Hospital and Medical Center, Chicago, Illinois and paid an honorarium of $1,000.00 and reimbursed $500.00 travel expense to promote Off-Label use of Lovenox as evidenced by payment request no. 207885.

(n) Genecom contracted with Dr. Enrique Ginzberg ("Ginzberg") for a speaking engagement which occurred on November 10, 1996 at Buena Vista Palace, Buena Vista, Florida, for the primary purpose of marketing the Off-Label use of Lovenox. Ginzberg was paid $1,500.00 and reimbursed $300.00 travel expense and a $500.00 display expense to promote use of Lovenox as evidenced by payment request no. D85022.

(o) On January 7, 1997 $5,000.00 was paid to the Washington Department of Surgery for the purpose of promoting the Off-Label use of Lovenox in abdominal surgery as evidenced by payment request no. 115738.

(p) On January 6, 1997 Dr. Lawrence Moraw was paid an honorarium of $1000.00 and reimbursed $2400 in expenses to speak to attending physicians with the purpose of influencing doctors to use Lovenox.

(q) On February 27, 1997, $750.00 was paid to the University of Texas to inform General Surgeons of new indications of Lovenox as evidenced by payment request no. 106257.

(r) On December 26, 1996 $250.00 was paid to Barnes Trauma Service to display Off-Label promotion of Lovenox as evidenced by payment request no. 096630.

B. *Promotion of Nasacort AQ prior to FDA Approval for the Indicated Uses.*

39. Prior to obtaining FDA approval Defendants conspired to solicit grants which provided the opportunity to

promote the use of Nasacort AQ prior to FDA approval as evidenced by the following transactions, each of which was effectuated by use of the United States mail and telephonic communications:

(a) Honorarium of $100.00 was paid to Dr. Raymond Rosdale to speak on February 14, 1996 to attending physicians in Canton, Ohio for the specific purpose to encourage continued use of Nasacort AQ.
(b) On February 3, 1996 $300.00 in the form of fundraiser tickets were paid to Dr. Michael Fogs to encourage the use of Nasacort AQ.
(c) On May 1, 1996 Dr. Steven H. Kimura was paid an honorarium of $250.00 and reimbursed $860.00 in expenses to educate physicians on advantages of Nasacort AQ. The location of the speaking engagement was Wrigley Field, Chicago, Illinois.
(d) In May 1996, a $1,000.00 honorarium and $4,566.11 in expenses were paid to have Dr. Michael Fogs to speak to physicians and influence their prescribing Nasacort AQ.
(e) In May 1996, Dr. Michael Fogs was paid an honorarium of $750.00 and $2,000.00 in expenses were paid of physicians attending to influence their use of Nasacort AQ at the Oaklawn Hilton in Oaklawn, Illinois.
(f) In February 1996, Michigan Capital Medical Center was paid $500.00 in display fees to promote the introduction of Nasacort AQ at the Schush Mountain Resort in Belle Aire, Michigan.
(g) In June 1996, Michigan Oto-laryngologicl society was paid $400.00 to increase use of Nasacort AQ prescriptions.
(h) In April 1996, Eugene T. Tarty was paid an honorarium of $300.00 and $1,800.00 in expenses were paid to Michigan Oto-laryngologicl Society to increase use of Nasacort AQ.

(i) In April 1996, Eugene T. Tarty was paid an honorarium of $300.00 and $1,800.00 in expenses were paid to Michigan Oto-Laryngologicl Society to promote the introduction of Nasacort AQ.

(j) In June 1996, $1,300.00 were paid to the Kentucky Institute for the Arts for tickets for physicians to encourage the use of Nasacort AQ. Physician's expenses were paid and an honorarium of $750.00 paid to Dr. Michael Fogs to solicit the use of Nasacort AQ by attending physicians.

(k) In April 1996, $175.00 was paid for an entertainment function at Penn State Scantillion State College, Pennsylvania for the purpose of inducing physicians to use Nasacort AQ.

C. *Influence of Off-Label Uses and Kickbacks for Promotion.*

40. Defendants employed schemes to influence Off-Label use and paid kickbacks for promotion of Lovenox, Nasacort AQ, Taxotere, Rilutek and others as evidenced by the following transactions, each of which was effectuated by use of the United States mail and telephonic communications:

(a) On January 30, 1997 $100.00 was paid to Dr. Pond to influence physicians to prescribe Lovenox.

(b) On November 8, 1996 $526.12 was paid to Dr. Rizzo for reimbursement of travel expenses for assisting in influencing doctors to use Lovenox.

(c) On January 20, 1997, $250.00 was paid to the Weelsley Family Practice for purposes of a TV information session as evidenced by payment request no. 203201.

(d) On January 3, 1997 $1000.00 was paid to Robert Brown to speak to neurologists and induce them to use Rilutek as evidenced by payment request no. 153268.

(e) On January 10, 1997 $250.00 was paid to Dr. Simmons to speak to physicians and influence their prescribing of Nasacort AQ as evidenced by payment request no. 107963.
(f) On February 2, 1997 $3,000.00 was paid to conduct a "round-table" discussion with nineteen (19) orthopedic surgeons at the Minnesota Timberwolves game as evidenced by payment request no. 000782.
(g) On September 10, 1996 $5,000.00 was paid to Orthopedic Research and Education Foundation as a gift to take doctors to a Chicago Cubs game.
(h) On August 21, 1996 $1,000.00 was paid for a gift to Dr. Fineman to take his family to Tijuana, Mexico as evidenced by payment request no. 000827.
(i) On October 19, 1996 a $50,000.00 grant was paid to Prescription Solutions to influence use of RPRP products.
(j) On January 20, 1997 a $100.00 gift was paid to Dr. Sweet to influence use of RPRP products.
(k) On January 24, 1997 a $40.00 gift was paid to Dr. Strahen to influence use of RPRP products.
(l) On February 25, 1997 a $146.47 gift was paid to Dr. Lemme to influence use of RPRP products.
(m) On February 20, 1997 a $160.00 gift was paid to Dr. Martin to influence use of RPRP products.
(n) In February 1997 a $120.00 gift was paid to Dr. Lemke to influence use of RPRP products.
(o) On January 25, 1997 a $100.00 gift was paid to San Joaquin Pharmaceutical Association to influence use of RPRP products.

41. Pursuant to 42 U.S.C. 1320a-7b(b)(2) it was illegal for RPRP and its co-conspirators to pay any remuneration either in cash or in kind to induce physicians to prescribe drugs which may be, in whole or in part, paid under medicare programs or other state health care programs.

D. *Management Indifference, Cover-up and Harassment*

42. Plaintiffs, on repeated occasions, have brought to RPRP management's attention improper promotional payments and promotional violations and it has failed to take any remedial action to cease this wrongful conduct and has chosen to intimidate and harass Plaintiffs for speaking out against such violations as evidenced by the following conduct:

(a) At a training seminar specifically designed to train sales representatives on Off-Label promotions, the use of Lovenox in connection with epidural catheters was specifically discussed despite the fact that the FDA approved label provides a warning against such use. Sales representatives were encouraged to use clinical studies relating to this non-indicated use and in violation of specific warnings on the label.

(b) Plaintiff Hamm questioned management on the use of these studies and the requirement to fully disclose that two pulmonary embolism deaths had occurred in the test group.

(c) The Off-Label program group trainer Kristi Menzel, a Florida Area Manager, informed the attending sales representative "Don't bring up pulmonary embolism deaths, we want to use the clinical studies to sell the product, not throw it in the trash can."

(d) In early 1996 Plaintiff DeCembrino advised in-house counsel to RPRP, Terry Green, ("Green") that the company was promoting Nasacort AQ prior to its receiving FDA approval as indicated by the promotional event payment request forms submitted to her office. In addition, this documentation showed that RPRP was promoting Taxotere prior to FDA approval, and that it was submitted to legal for review by other business assistants. The legal department directed DeCembrino and others to pay for these illegal promotional events despite knowing

that they were in direct violation of federal regulations. In addition, Green advised DeCembrino that "We have to get rid of the paperwork because of what is written on it." He also asked that she arrange to have the promotional event payment requests rewritten and to destroy the evidence of the illegal promotions.

(e) On or about January 1996, Plaintiff DeCembrino told RPRP's Corporate Legal Department that many of the promotional event payment requests indicated that they were designed for the specific purpose of promoting Off-Label use of Lovenox. When DeCembrino approached the ATOD Director, Jesse Hales, to explain a delayed payment to Dr. Turpie or Geertz, Hales stated "don't worry about these matters I know how to handle lawyers, I've been dealing with them for a long time". Subsequently, payment on the promotional event requests were made and the Genecom program was created as a conduit for Off-Label promotions.

(f) In March 1997, RPRP's Marketing Director held a meeting attended by Plaintiffs Linda Conolly and Elaine DeCembrino together with four (4) other department employees at which time DeCembrino specifically requested of Amey what they should do with regards to the repeated problems that arise with regards to promotional event payment requests that are not in compliance with FDA or Company policy and procedures. Mr. Amey specifically responded "nothings going to change until someone gets caught".

(g) In April 1996, a round table discussion was held between Peter Lankau, Terry Green, Bruce Mazer and other field representatives to discuss how the Company should proceed because of problems related to promotional events for Off-Label use and pre-approved drugs. When these representatives were shown evidence of Off-Label promotion, promotion of drugs prior to approval and

remuneration for commitments for use of the drugs, Peter Lankau and the other Business Directors denied that any of this was being done on our paperwork and DeCembrino was asked to show them the proof. Terry Green told them that RPRP had been fortunate up to now and had better clean it up.

(h) On repeated occasions Dean Murray, Manager of Creative Services, at RPRP who reports to Ron Amey, Director of Marketing, commented to both DeCembrino and Conolly after bringing to her attention repeated promotional violations "If you are so moral and ethical maybe you should look elsewhere, maybe out of the company" and "how the hell do you expect the reps to sell if they don't do Off-Label promotions, we only have me-too products!

(i) In March 1996 Bohm, after being chastised by a physician for an Off-Label promotion by Turpie, a promotion which Bohm had not arranged, Bohm advised her supervisor of her refusal to participate in Off-Label promotion. In April, Bohm was advised by her supervisor that he would not support her promotion request because "you talk too much!"

(j) In March 1997 RPRP continued its Off-Label sales training by retaining a physician to give a presentation to sales representatives on using Lovenox with epidural catheter and advocated pulling the catheters after the eleventh hour after a Lovenox dosage and redosing within two or three hours. This practice is contrary to the package inserts. The Company advocated representatives talking to anesthesiologists and advising the continued use of Lovenox with epidural catheter which is an illegal practice and endangers patients' lives.

(k) RPRP has continued to encourage Off-Label promotions by promoting sales representatives who achieved high sales from Off-Label uses to managerial

positions and assign these representatives the task of teaching new sales representatives how to increase sales through the use of Off-Label promotions.

(l) The Company offered to sales representatives reprints of clinical studies to present to anesthesiologists to substantiate the use of Lovenox with epidural catheter. The sales representatives were advised to use the clinical studies to promote sales but "cover their tracks" by not leaving the study with the physician.

FIRST CLAIM FOR RELIEF

Class Action Claim for Violations of § 1962(a) and (d) of RICO

43. Plaintiffs reallege Paragraphs 1 - 33 as if fully restated herein and further state and allege as follows.

44. Defendants knowingly, and recklessly or culpably engaged in illegal schemes by conduct including, but not limited to (a) adopting a secret scheme, artifice, or plan to illegally promote the Off-Label sale of approved FDA products of RPRP; (b) promoting the sale of RPRP drugs prior to FDA approval; (c) illegally influencing the sale of RPRP products directly or indirectly by illegal remunerations to physicians and hospital personnel; (d) coercing or otherwise influencing Plaintiffs and the class to participate in the illegal promotions identified above.

45. Plaintiffs are each "a person" as that term is defined in § 1963(3) of RICO, 18 U.S.C. § 1961(3).

46. Defendants are each a "person" as that term is defined in § 1963(3) of RICO, 18 U.S.C. § 1961(3).

47. At all times relevant to the events alleged in this Complaint, the Defendants were associated with an "enterprise", as that term is defined in § 1961(4) of RICO, 18 U.S.C. § 1961(4) which was engaged in interstate and foreign

commerce and the activities of which affected interstate and foreign commerce. For purposes of this claim under § 1962(a) and (d) of RICO, 18 U.S.C. § 1962(a) and (d), of the enterprise consisting of Genecom, a division of Defendant Becker or, in the alternative, an association in fact of RPRP and Becker.

48. In violation of RICO, 18 U.S.C. § 1962(a) and (d) Defendants have received and conspired to receive, directly or indirectly, income derived from a pattern of racketeering activity and have used and invested, or conspired to use or invest, directly or indirectly, such income, or the proceeds of such income in the operation of Genecom or, alternatively, in association in fact of each member of RPRP and Becker. The above-referenced income consists of all profits derived from the Off-Label promotion of Lovenox and profits derived from the pre-FDA approved promotions of Taxotere and Nasacort AQ in the approximate amount of $100,000,000, the exact amount to be proven at trial.

49. Defendants engaged in the above-referenced violations of § 1962(a) and (d) of RICO through a pattern of racketeering activity, as that term is defined in § 1961(a)(A), (B), and § 1961(5) of RICO, 18 U.S.C. §§ 1961(1)(A), (B) and (D), and § 1961(5). The racketeering activity in which Defendants engaged is alleged in greater detail in this Complaint and includes:

> (a) As alleged in greater detail above, acts of illegal promotions in violation of the Food, Drug and Cosmetic Act, 21 U.S.C. § 301 et seq.; 21 C.F.R. 202.1(e)(4)(i)(a), (ii) and (iii); 21 C.F.R. 202.1(e)(6)(i) and (xi); 21 C.F.R. 201.128.
>
> (b) As alleged in greater detail above, acts by which the Defendants, in violation of the Medicare/Medicaid Anti-kickback Statutes 42 U.S.C. §§ 1320a-7b(b)(2), affect commerce by illegal remunerations paid to unnamed individuals in return for arranging for or

recommending purchasing items for which payment may be made in whole or in part under Medicare or Medicaid or other state health care programs;

(c) As alleged in greater detail above, acts of travel and interstate and/or foreign commerce with the intent to promote, manage, establish, carry on, facilitate the promotion, management, establishment or carrying on of illegal drug promotions in violation of the Travel Act, 18 U.S.C. § 1952, carried out the above-referenced scheme or artifice to illegally promote the drugs of RPRP; and

(d) As alleged in greater detail above, acts of wire fraud by which the Defendants, in violation of the Federal Wire Fraud Statute, 18 U.S.C. § 1343, carried out the above-referenced scheme or artifice to illegally promote drugs of RPRP.

(e) As alleged in greater detail above, acts of mail fraud by which the Defendants, in violation of the Federal Mail Fraud Statute, 18 U.S.C. § 1341, carried out the above-referenced scheme or artifice to illegally promote drugs of RPRP.

50. The above-referenced predicate acts all occurred after the effective date of RICO and within ten (10) years of each other. Each of the Defendants' racketeering activities were undertaken for the purpose of furthering their common scheme or artifice to illegally promote RPRP drugs and each such act of racketeering activity had similar purposes, involved the same or similar participants and had similar results impacting similar victims, mainly past and present employees of RPRP and was part of a recurring pattern of similar schemes which, thus, constituted a pattern of racketeering activity as defined in § 1961(5) of RICO. Each of the Defendants agreed and conspired with other Defendants and/or co-actors to commit the above-referenced predicate acts.

51. In furtherance of Defendants' conspiracies, RPRP has damaged the business reputation of Plaintiffs in the pharmaceutical industry.

52. In furtherance of Defendants' conspiracies, RPRP, in its attempts to coerce Defendants complicity, has harassed, deprived compensation, promotions, and retaliated against Plaintiffs during their employment.

53. As a direct and proximate result of Defendants' activities and conduct in violation of § 1962(a) and (d) of RICO, Plaintiffs and the class have been injured in their business and property. Under the provisions of § 1964(c) of RICO, Plaintiffs can seek to recover herein treble damages and the cost of bringing this action, including reasonable attorney's fees.

SECOND CLAIM FOR RELIEF

(Class Action Claim for Violations of § 1962(c) and (d) of RICO)

54. Plaintiffs reallege Paragraphs 1 - 51 as if fully restated herein and further state and allege as follows.

55. Defendants knowingly, and recklessly, or culpably engaged in the scheme by conduct including, but not limited to (a) adopting a secret scheme, artifice, or plan to illegally promote the Off-Label sale of approved FDA products of RPRP; (b) promote the sale of RPRP drugs prior to FDA approval; (c) illegally influence the sale of RPRP products directly or indirectly by illegal remunerations to physicians and hospital personnel; (d) coerce or otherwise influence Plaintiffs to participate in the illegal promotions identified above.

56. Plaintiffs are each "a person" as that term is defined in § 1963(3) of RICO, 18 U.S.C. § 1961(3).

57. Defendants are each a "person" as that term is defined in § 1963(3) of RICO, 18 U.S.C. § 1961(3).

58. At all times relevant to the events alleged in this Complaint, the Defendants were associated with an "enterprise", as that term is defined in § 1961(4) of RICO, 18 U.S.C. § 1961(4) which was engaged in interstate and foreign commerce and the activities of which affected interstate and foreign commerce. For purposes of this claim under § 1962(c) and (d) of RICO, 18 U.S.C. § 1962(c) and (d), of the enterprise consisting of Genecom, a division of Defendant Becker or, in the alternative, an association in fact of RPRP and Becker.

59. In violation RICO, 18 U.S.C. § 1962(c) and (d) Defendants have received and conspired to receive, directly or indirectly, income derived from a pattern of racketeering activity and have used and invested, or conspired to use or invest, directly or indirectly, such income, or the proceeds of such income in the operation of Genecom or, alternatively, in association in fact of each member of RPRP and Becker. The above-referenced income consists of all profits derived from the Off-Label promotion of Lovenox and others and profits derived from the pre-FDA approved promotions of Taxotere and Nasacort AQ in the approximate amount of $100,000,000, the exact amount to be proven at trial.

60. Defendants engaged in the above-referenced violations of § 1962(c) and (d) of RICO through a pattern of racketeering activity, as that term is defined in § 1961(a)(A), (B), and § 1961(5) of RICO, 18 U.S.C. §§ 1961(1)(A), (B) and (D), and § 1961(5). The racketeering activity in which Defendants engaged is alleged in greater detail in this Complaint and includes:

(a) As alleged in greater detail above, acts of illegal promotions in violation of the Food, Drug and Cosmetic Act, 21 U.S.C. § 301 et seq.; 21 C.F.R. 202.1(e)(4)(i)(a), (ii) and (iii); 21 C.F.R. 202.1(e)(6)(i) and (xi); 21 C.F.R. 201.128.

(b) As alleged in greater detail above, acts by which the Defendants, in violation of the Medicare/Medicaid Anti-kickback Statutes 42 U.S.C. §§ 1320a-7b(b)(2), affect commerce by illegal remunerations paid to unnamed individuals in return for arranging for or recommending purchasing items for which payment may be made in whole or in part under Medicare or Medicaid or other state health care programs;

(c) As alleged in greater detail above, acts of travel and interstate and/or foreign commerce with the intent to promote, manage, establish, carry on, facilitate the promotion, management, establishment or carrying on of illegal drug promotions in violation of the Travel Act, 18 U.S.C. § 1952, carried out the above-referenced scheme or artifice to illegally promote the drugs of RPRP; and

(d) As alleged in greater detail above, acts of wire fraud by which the Defendants, in violation of the Federal Wire Fraud Statute, 18 U.S.C. § 1343, carried out the above-referenced scheme or artifice to illegally promote drugs of RPRP.

(e) As alleged in greater detail above, acts of mail fraud by which the Defendants, in violation of the Federal Mail Fraud Statute, 18 U.S.C. § 1341, carried out the above-referenced scheme or artifice to illegally promote drugs of RPRP.

61. The above-referenced predicate acts all occurred after the effective date of RICO and within ten (10) years of each other. Each of the Defendants' racketeering activities were undertaken for the purpose of furthering their common scheme or artifice to illegally promote RPRP drugs and each such act of racketeering activity had similar purposes, involved the same or similar participants and had similar results impacting similar victims, mainly past and present employees of RPRP and was

part of a recurring pattern of similar schemes which, thus, constituted a pattern of racketeering activity as defined in § 1961(5) of RICO. Each of the Defendants agreed and conspired with other Defendants and/or co-actors to commit the above-referenced predicate acts.

62. In furtherance of Defendants' conspiracies, RPRP has damaged the business reputation of Plaintiffs in the pharmaceutical industry.

63. In furtherance of Defendants' conspiracies, RPRP, in its attempts to coerce Defendants complicity, has harassed, deprived compensation, promotions, and retaliated against Plaintiffs during their employment.

64. As a direct and proximate result of Defendants' activities and conduct in violation of § 1962(c) and (d) of RICO, Plaintiffs and the members of the Class have been injured in their business and property. Under the provisions of § 1964(c) of RICO, Plaintiffs can seek to recover herein treble damages and the cost of bringing this action, including reasonable attorney's fees.

THIRD CLAIM FOR RELIEF

Adverse Employment Action

65. Plaintiff Hamm realleges paragraphs 1 - 60 as if fully restated herein and further alleges as follows.

66. That RPRP insistence that he violate federal statutes and regulations as a term and condition of his employment resulted in his being constructively discharged by his termination of employment.

67. RPRP's insistence that Hamm violate federal statutes and regulations is a breach of its duty of good faith and fair dealing.

68. RPRP's constructive discharge of Hamm for refusing to comply with its request to violate federal law violates federal

common law and the public policy of the States of Louisiana and Texas all to Hamm's damage in an amount in excess of $1,000,000 the exact amount to be proven at trial.

FOURTH CLAIM FOR RELIEF

Intentional/Reckless Infliction of Emotional Distress

69. Plaintiff Hamm realleges Paragraphs 1 - 63 as if fully restated herein and further states and alleges as follows.

70. Defendant RPRP's coercive efforts against Plaintiff to violate state and federal laws and its failure to take appropriate and adequate actions to address Plaintiff's Complaint and its wanton disregard for its own established policies was intentional or reckless, extreme and outrageous, and caused Plaintiff to suffer severe emotional distress.

71. Defendant RPRP's employees conduct, retaliation and statements were performed within their managerial and supervisory positions with Defendant RPRP.

72. As a direct and proximate result of the aforesaid conduct by Defendant RPRP, Plaintiff suffered serious and permanent injuries and other damages in an amount in excess of $75,000.00, the exact amount to be proven at trial.

FIFTH CLAIM FOR RELIEF

Adverse Employment Action

73. Plaintiff Bohm realleges paragraphs 1 - 67 as if fully restated herein and further states and alleges as follows.

74. RPRP has denied Bohm promotional opportunities as a result of her refusal to participate in illegal promotions in violation of federal statutes and regulations.

75. RPRP's insistence that Bohm violate federal statutes and regulations is a breach of its duty of good faith and fair dealing.

76. RPRP has harassed Bohm by freezing her company credit card.

77. RPRP has harassed Bohm by being unexcusably dilatory in payment of Bohm's company expenses.

78. RPRP has harassed Bohm by canceling a corporate trip to Paris that was earned and due to Bohm as part of a corporate sales incentive program.

79. That on information and belief RPRP intends to terminate Bohm for her disclosure of violations of federal statutes and regulations and refusal to participate in the unlawful practices of said Defendant.

80. The retaliatory acts of RPRP including the anticipated discharge of Bohm violates federal common law and the public policy of the States of Maryland and Delaware, and the District of Columbia all to Bohm's damage in an amount in excess of $1,000,000 the exact amount to be proven at trial.

SIXTH CLAIM FOR RELIEF

Intentional/Reckless Infliction of Emotional Distress

81. Plaintiff Bohm realleges Paragraphs 1 - 71 as if fully restated herein and further states and alleges as follows.

82. Defendant RPRP's coercive efforts against Plaintiff to violate state and federal laws and its failure to take appropriate and adequate actions to address Plaintiff's Complaint and its wanton disregard for its own established policies was intentional or reckless, extreme and outrageous, and caused Plaintiff to suffer severe emotional distress.

83. Defendant RPRP's employees conduct, retaliation and statements were performed within their managerial and supervisory positions with Defendant RPRP.

84. As a direct and proximate result of the aforesaid conduct by Defendant RPRP, Plaintiff suffered serious and permanent injuries and other damages in an amount in excess of $75,000.00, the exact amount to be proven at trial.

SEVENTH CLAIM FOR RELIEF

Adverse Employment Action

85. Plaintiff DeCembrino realleges paragraphs 1 - 75 as if fully restated herein and further states and alleges as follows.

86. That RPRP has terminated DeCembrino for her disclosure of violations of federal statutes and regulations and refusal to participate in the unlawful practices of said Defendant.

87. That RPRP's insistence that DeCembrino violate federal statutes and regulations as a term and condition of her employment resulted in her being placed on a paid leave of absence.

88. RPRP's insistence that DeCembrino violate federal statutes and regulations is a breach of its duty of good faith and fair dealing.

89. The retaliatory acts of RPRP including job reassignment, placement of paid leave and subsequent termination of DeCembrino violates federal common law and the public policy of the State of Pennsylvania all to DeCembrino damage in an amount in excess of $1,000,000 the exact amount to be proven at trial.

EIGHTH CLAIM FOR RELIEF

Intentional/Reckless Infliction of Emotional Distress

90. Plaintiff DeCembrino realleges Paragraphs 1 - 78 as if fully restated herein and further states and alleges as follows.

91. Defendant RPRP's coercive efforts against Plaintiff to violate state and federal laws and its failure to take appropriate and adequate actions to address Plaintiff's Complaint and its wanton disregard for its own established policies was intentional or reckless, extreme and outrageous, and caused Plaintiff to suffer severe emotional distress.

92. Defendant RPRP's employees conduct, retaliation and statements were performed within their managerial and supervisory positions with Defendant RPRP.

93. As a direct and proximate result of the aforesaid conduct by Defendant RPRP, Plaintiff suffered serious and permanent injuries and other damages in an amount in excess of $75,000.00, the exact amount to be proven at trial.

NINTH CLAIM FOR RELIEF

Adverse Employment Action

94. Plaintiff Conolly realleges paragraphs 1 - 82 as if fully restated herein and further states and alleges as follows.

95. That on information and belief RPRP has terminated Conolly for her disclosure of violations of federal statutes and regulations and refusal to participate in the unlawful practices of said Defendant.

96. That RPRP's insistence that Conolly violate federal statutes and regulations as a term and condition of her employment resulted in her being placed on a paid leave of absence.

97. RPRP's insistence that Conolly violate federal statutes and regulations is a breach of its duty of good faith and fair dealing.

98. The retaliatory acts of RPRP including job reassignment, placement on paid leave and subsequent termination of Conolly violates federal common law and the public policy of the State of Pennsylvania all to Conolly

damage in an amount in excess of $1,000,000 the exact amount to be proven at trial.

TENTH CLAIM FOR RELIEF

Intentional/Reckless Infliction of Emotional Distress

99. Plaintiff Conolly realleges Paragraphs 1 - 85 as if fully restated herein and further states and alleges as follows.

100. Defendant RPRP's coercive efforts against Plaintiff to violate state and federal laws and its failure to take appropriate and adequate actions to address Plaintiff's Complaint and its wanton disregard for its own established policies was intentional or reckless, extreme and outrageous, and caused Plaintiff to suffer severe emotional distress.

101. Defendant RPRP's employees conduct, retaliation and statements were performed within their managerial and supervisory positions with Defendant RPRP.

102. As a direct and proximate result of the aforesaid conduct by Defendant RPRP, Plaintiff suffered serious and permanent injuries and other damages in an amount in excess of $75,000.00, the exact amount to be proven at trial.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs seek such judgment, jointly and severally against all Defendants as follows:

1. Declaring the action to be a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure;

2. For Treble damage pursuant to § 1964(c) of RICO;

3. For an order permanently enjoining and restraining Defendant from participating directly or indirectly in all promotional activities for Off-Label use of Lovenox, Taxotere,

Nasacort AQ and any other FDA approved drugs of Defendant RPRP and taking further retaliatory actions against Plaintiffs;

4. For the costs of bringing this action, including reasonable attorney's fees and expert witness fees;

5. For judgment in favor of Hamm against RPRP for its adverse employment action, state law claim in the amount of $1,000,000 or such other amount as proven at trial;

6. For judgment in favor of Hamm against RPRP for intentional infliction of emotional distress in the amount of $75,000, the exact amount to be proven at trial;

7. For judgment in favor of Bohm against RPRP for its adverse employment action, state law claim in the amount of $1,000,000 or such other amount as proven at trial;

8. For judgment in favor of Bohm against RPRP for intentional infliction of emotional distress in the amount of $75,000, the exact amount to be proven at trial;

9. For judgment in favor of DeCembrino against RPRP for its adverse employment action, state law claim in the amount of $1,000,000 or such other amount as proven at trial;

10. For judgment in favor of DeCembrino against RPRP for intentional infliction of emotional distress in the amount of $75,000, the exact amount to be proven at trial;

11. For judgment in favor of Conolly against RPRP for its adverse employment action, state law claim in the amount of $1,000,000 or such other amount as proven at trial; and

12. For judgment in favor of Conolly against RPRP for intentional infliction of emotional distress in the amount of $75,000, the exact amount to be proven at trial;

13. For such other and further relief as the Court deems just and fair.

Dated:_____

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Supreme Court, U.S.
FILED
DEC 9 1999
CLERK

No. 99-803

IN THE

Supreme Court of the United States

JOHN HAMM, *et al.*,

Petitioners,

v.

RHÔNE-POULENC RORER PHARMACEUTICALS INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT RHÔNE-POULENC RORER PHARMACEUTICALS INC.

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QUESTIONS PRESENTED

Whether this Court should grant certiorari to issue an advisory opinion on the question whether injury to a person's reputation constitutes injury to "business or property" under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1964(c), when there is no split of authority among the circuits and the issue is not case dispositive?

Whether this Court should grant certiorari to issue an advisory opinion on the question whether plaintiffs had standing to sue under § 1962(d) for retaliatory discharge in furtherance of a RICO conspiracy when the claim based on discharge was withdrawn below and the issue is not case dispositive?

STATEMENT PURSUANT TO RULE 29.6

In accordance with Rule 29.6 of the Rules of this Court, respondent Rhône-Poulenc Rorer Pharmaceuticals Inc. states that it is an indirect, wholly-owned subsidiary of Rhône-Poulenc Rorer Inc. Rhône-Poulenc Rorer Inc. is a wholly-owned subsidiary of Rhône-Poulenc S.A. American depository receipts of Rhône-Poulenc S.A. are traded on the New York Stock Exchange. Subject to regulatory and shareholder approvals, Rhône-Poulenc S.A. and Hoechst A.G. plan to merge their life sciences activities (pharmaceuticals, animal and plant health) effective December 15, 1999. Following the merger, the ultimate parent of Rhône-Poulenc Rorer Inc. will be Aventis (which will be the new name of Rhône-Poulenc S.A.).

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INTRODUCTION

Plaintiffs seek review of a summary judgment entered by the United States District Court for the District of Minnesota and affirmed by the Eighth Circuit. Plaintiffs are four former employees of defendant-respondent, Rhône-Poulenc Rorer Pharmaceuticals Inc. ("RPR"). Plaintiffs allege that RPR improperly marketed four of its pharmaceutical products with intent to induce hospitals and others to purchase these products for uses not approved by the United States Food and Drug Administration. Pet. App. E-8 at ¶ 22. Plaintiffs do not claim that, as employees, they were directly damaged by this marketing activity. Rather, plaintiffs alleged *initially* that they were damaged by retaliatory employment action taken against them for criticizing or refusing to participate in the alleged activity. *Later*, however, when plaintiffs encountered resistance to their claim in the District Court, they blithely changed their factual allegations and claimed that they actually participated in the challenged marketing activities and that their reputations were damaged as a result. Pet. App. A-18, C-11.

Plaintiffs sued in federal court, basing jurisdiction upon the Racketeer Influenced and Corrupt Organizations Act ("RICO") and appending several state law claims. The District Court entered judgment on the RICO claim for failure to state a claim and dismissed the state law claims for lack of subject matter jurisdiction. The District Court dismissed the RICO claims on four grounds: (1) plaintiffs lacked standing under RICO to sue for their indirect injury; (2) plaintiffs' alleged injury to their reputations did not constitute injury to "business or property" as required under RICO; (3) the RICO statute is not intended to reward with treble damages persons who knowingly participate in the

alleged racketeering activity; and (4) plaintiffs could not state a claim for injury to reputation based upon acts that they voluntarily carried out. Pet. App. C-19 - C-20. The United States Court of Appeals for the Eighth Circuit affirmed. Pet. App. A-20.

Now, plaintiffs seek review of their case by this Court. In so doing, however, plaintiffs challenge only two of the bases underlying the judgment below. As to their RICO claim under § 1962(c), plaintiffs ask this Court to consider whether injury to personal reputation constitutes injury to "business or property." As to their RICO claim under § 1962(d), plaintiffs ask this Court to consider whether they can sue for injury caused by a non-racketeering overt act in furtherance of a RICO conspiracy. Because the two issues raised by plaintiffs do not address all the independent grounds for the entry of the judgment below, even a successful appeal to this Court should not change the result below.

RPR respectfully submits that this Court should decline to grant certiorari. First, with respect to plaintiffs' initial issue, the Eighth Circuit properly held that injury to reputation is a personal injury and does not constitute injury to business or property as required by RICO. Because there is no split among the circuits on this issue and the Eighth Circuit's decision is in accord with the case law, there is no reason to grant certiorari to consider that issue. With respect to plaintiffs' second issue, plaintiffs changed their factual allegations, withdrew their claim, and substituted a new claim that would grossly distort RICO by allowing participants in racketeering activities to recover for reputational injury. There is no reason for the Court to consider such a strained and novel reading of the statute. Third, and finally, this Court should deny certiorari because the two issues raised by

plaintiffs are not case dispositive. Due to the existence of alternative grounds underlying the judgment, any opinion from this Court would necessarily be advisory in nature.

STATEMENT OF FACTS

A. The Parties

Plaintiffs are four individuals who reside in Texas, Maryland and Pennsylvania. Pet. App. E-4 at ¶¶ 4-7. Plaintiffs Hamm and Bohm were employed by RPR as sales representatives. Pet. App. E-4 at ¶¶ 4, 7. Plaintiff Conolly was employed by RPR as a data entry clerk, promotional literature coordinator and promotional event coordinator, and plaintiff DeCembrino was employed as a supervisor of budget and promotion. Pet. App. E-4 at ¶¶ 5-6.

RPR is a Delaware corporation with its principal place of business in Collegeville, Pennsylvania. Among other things, RPR manufactures and sells pharmaceutical products. Defendant Robert A. Becker is an advertising agency in New York which plaintiffs allege also operates under the fictitious name Genecom. Pet. App. E-5 at ¶ 10. Defendant Alexander Turpie is a medical doctor who resides in Canada. Pet. App. E-5 at ¶ 11.

Plaintiffs instituted this action on June 3, 1997 by filing a Complaint in the United States District Court for the District of Minnesota. Plaintiffs sued on their own behalf and purportedly on behalf of a class of RPR employees alleged to be similarly situated. On June 13, 1997, plaintiffs filed a First Amended Complaint as a matter of right, and on September 2, 1997, Magistrate Judge John M. Mason granted them leave to file a Second Amended Complaint.

B. Second Amended Complaint

In their Second Amended Complaint, plaintiffs alleged that RPR illegally marketed four of its pharmaceutical products. Those products are Lovenox®, Nasacort AQ®, Taxotere® and Rilutek® (the "RPR Products"), products widely used in the treatment of blood clotting, asthma, cancer, and ALS, respectively. In particular, plaintiffs alleged: (i) that RPR promoted the RPR Products for uses not indicated on the FDA-approved label (sometimes referred to as "off-label" uses) in violation of the Food, Drug and Cosmetic Act; and (ii) that RPR compensated physicians for prescribing these products in violation of the Medicare/ Medicaid Antikickback Statute. Pet. App. E-7 - E-16 at ¶¶ 20-41. Specifically, it was alleged that RPR provided information regarding off-label uses of Lovenox® to its salespeople, encouraged its salespeople to solicit physicians who would prescribe Lovenox® for off-label uses, arranged for speaking events for physicians who used the RPR products for off-label uses, set sales quotas that implicitly included off-label sales of the RPR products, made allegedly improper payments to doctors to serve as speakers, and paid physicians to encourage off-label uses of the RPR products. Plaintiffs allege these activities were carried out through the mail and by wire and constitute racketeering activity.

Plaintiffs did not claim that they were injured or damaged by this marketing activity. Indeed, plaintiffs alleged that the purpose or intent of the activity was "to defraud hospital administrators, physicians, and other medical personal [sic] into prescribing or purchasing [RPR] products." Pet. App. E-8 at ¶ 22. In their Second Amended Complaint, plaintiffs alleged that their injuries occurred because they criticized and refused to participate in the alleged promotional activity

and RPR retaliated against them. In particular, plaintiffs alleged that they and the other purported class members were "terminated, denied promotional opportunities, denied compensation rewards, lost stock option plans, deprived of pension benefits and subjected to intimidation and harassment, and defamed for either refusing to participate in the illegal promotion of Off-Label usage of [RPR] products and kickbacks to parties committing to use of its products." Pet. App. E-6 at ¶ 13. Plaintiffs claimed they were entitled to recover their alleged damages under the Racketeer Influenced Corrupt Organizations Act ("RICO") and state law.

On June 26, 1997, RPR filed a motion to dismiss asserting that the plaintiffs had not alleged a direct injury arising from the alleged racketeering acts and, therefore, lacked standing to assert claims under RICO. On August 1, 1997, plaintiffs filed a memorandum of law in opposition to RPR's motion to dismiss. Therein, plaintiffs alleged for the first time that the primary focus of their RICO claims was not any adverse employment action, but rather injury to their "business reputations" arising from association with the purported racketeering activities.

C. Oral Argument Before Magistrate Judge Mason

The District Court referred the motion to dismiss to Magistrate Judge John M. Mason. The Magistrate Judge heard extensive oral argument on September 2, 1997 and questioned plaintiffs' counsel closely regarding the absence of a direct injury. Plaintiffs conceded that, under the controlling law, they could not base a RICO claim upon allegations of wrongful discharge, denial of promotional opportunities, loss of compensation or benefits, harassment,

intimidation, or retaliation. Pet. App. A-5, C-10. This left plaintiffs with only their claim that they had been "defamed" or "self-defamed" and had suffered injuries to their reputations. Pet. App. A-5, C-17 - C-18. Plaintiffs conceded during the argument, moreover, that they were not defamed for "refusing to participate" in the alleged racketeering conduct (as pleaded in their Second Amended Complaint). Pet. App. A-5 - A-6, C-10, C-18. Thus, as Magistrate Judge Mason noted in his Report and Recommendation, plaintiffs admitted at the hearing that "none of the pleaded allegations of the Second Amended Complaint could give rise to a RICO claim" and "essentially withdrew these allegations." Pet. App. C-11 n.3, C-12.

In an attempt to save their RICO claims, however, plaintiffs asked the Court to consider new facts and an unpleaded theory of recovery. Pet. App. C-11. Specifically, at the argument before the Magistrate Judge, plaintiffs claimed for the first time that they had suffered injury to their business reputations not because they criticized the allegedly illegal marketing activities, but rather because they had actually participated in that conduct. Pet. App. A-18, C-11. This theory, and the facts underlying it, appeared nowhere in the original or amended complaints and, indeed, were directly contrary to plaintiffs' allegations that they had refused to participate in any allegedly illegal activity. Pet. App. C-11. Nevertheless, plaintiffs presented these new facts to the Magistrate Judge during argument (claiming "oversight" as the reason for not having presented them sooner) and asked the court to deny the motion to dismiss on that basis. Hence, when the record closed in the District Court, plaintiffs were relying on their allegation that they had participated in the alleged improper marketing activity,

that their reputations had been injured as a result, and that these facts gave them a claim under RICO.

D. The District Court's Decision

On September 18, 1997, the Magistrate Judge issued his Report and Recommendation. He recommended that the RICO claim be dismissed for failure to state a claim and that the state law claims be dismissed for lack of subject matter jurisdiction. The Magistrate Judge noted that plaintiffs had admitted that "none of the pleaded allegations of the Second Amended Complaint could give rise to a RICO claim[.]" Pet. App. C-11 n.3. Turning to plaintiffs' new allegations that they had participated in the alleged racketeering activity and suffered injuries to their reputations, the Magistrate Judge held that those allegations did not create a cause of action under RICO for four reasons. First, any alleged injury to reputation was not the direct or proximate result of participating in the alleged racketeering activity. Pet. App. C-19. Second, the RICO statute only permits recovery for injury to "business or property" and harm to an individual's reputation does not so qualify. Pet. App. C-20. Third, the RICO statute is not intended to reward persons who knowingly participate in the alleged racketeering activity. Pet. App. C-20. And fourth, the plaintiffs could not claim injury from alleged defamation, as theorized, because they had admitted to participating in the alleged wrongdoing. Pet. App. C-20.

Plaintiffs filed objections to the Report and Recommendation on October 3, 1997. In those objections, plaintiffs stated: "The focus for purposes of the RICO claims is upon the fact that the Defendants prayed [sic] upon the business reputations of Plaintiffs and used them to further

their illegal scheme. The direct result of this conduct is an injury to their business reputations." Plaintiffs only mention of adverse employment actions in their objections was to deny that they were the basis of their RICO claims.

Soon after filing their objections, plaintiffs sought voluntarily to dismiss their claims. In a brief filed with the Court on November 14, 1997, plaintiffs stated that "a dismissal with [sic] prejudice at this stage will save this Court time by providing the parties an opportunity to discover more facts which will make a determination at a later date more expedient in this court or another forum." Faced with the argument that they were seeking to engage in forum shopping, plaintiffs responded that "[i]t is for another judge to decide if a claim brought in their court is founded on bad faith, not this court."[1]

On November 25, 1997, the Honorable David S. Doty issued an Opinion adopting the Magistrate Judge's Report and Recommendation and denying plaintiffs' motion to voluntarily dismiss the case. With respect to the objections to the Report and Recommendation, the Court said:

> After independently reviewing the transcript of the hearing on this matter, the file and record and relevant case law, the court agrees with the magistrate judge's recommendation that the RICO claims asserted against the defendants be

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1. Faced with the adverse Report and Recommendation, plaintiffs had previously taken the extraordinary step of requesting that the Magistrate Judge disqualify himself from the case and vacate his Report and Recommendation due to the fact that he had many years earlier represented one of the lawyers for defendant Dr. Turpie in an unrelated proceeding. This request was denied.

> dismissed with prejudice. Plaintiffs have failed to assert a viable RICO claim against defendants for any injuries allegedly sustained.[2]

Pet. App. B-4.

E. Eighth Circuit Affirmance

On December 24, 1997, plaintiffs filed a Notice of Appeal to the United States Court of Appeals for the Eighth Circuit. In their brief on appeal, plaintiffs attempted to return to the allegations they had made in their Second Amended Complaint and tried to deny that they had presented new factual matters to the Magistrate Judge at the oral argument. The Eighth Circuit was not persuaded. In its Opinion of August 11, 1999, the Court noted that during the argument before the Magistrate Judge, plaintiffs had "conceded that, under *Bowman*,[3] [plaintiffs] could not base a civil RICO claim on allegations of wrongful discharge, denial of promotion, loss of compensation or benefits, harassment or intimidation, or retaliation." Pet. App. A-5. The Court observed that "[c]ounsel for [plaintiffs] then argued that appellants had been defamed not because they had criticized

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2. After dismissal of their claims in the District Court, three of the plaintiffs instituted lawsuits against RPR in other courts. Plaintiff Hamm instituted suit in state court in Texas and trial is scheduled for February 2000. Plaintiffs Conolly and DeCembrino instituted suit against RPR in federal court in Philadelphia. Their claims are being held in civil suspense pending resolution of this case.

3. *Bowman v. Western Automobile Supply Co.*, 985 F.2d 383 (CA8), *cert. denied*, 508 U.S. 957 (1993), is the Eighth Circuit decision interpreting this Court's RICO direct injury requirement in the context of employee whistleblower cases.

or refused to participate in the illegal promotion of off-label uses and kickbacks, but instead because they had actually participated in the illegal scheme." Pet. App. A-5. As the court noted, "[t]his was the opposite of what was alleged in the second amended complaint." Pet. App. A-6.

Although noting the existence of alternative grounds for the District Court's ruling, the Eighth Circuit addressed those particular issues which plaintiffs raised, rejected plaintiffs' position, and affirmed the entry of summary judgment in favor of defendants. On November 9, 1999, plaintiffs filed their petition for a writ of certiorari in this Court.

REASONS FOR DENYING THE WRIT

I. Certiorari On Plaintiffs' 1962(c) Claim Should Be Denied Because There Is No Meaningful Split Of Authority On The Issue Presented.

With respect to their RICO claim under § 1962(c), plaintiffs ask this Court to grant certiorari on one issue: whether plaintiffs can recover under RICO for injury to their reputations.

The RICO statute's civil enforcement provision provides:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of suit, including a reasonable attorney's fee.

18 U.S.C. § 1964(c). Thus, one element of every civil RICO claim is the existence of an injury to business or property. In the Courts below, plaintiffs argued that injury to reputation does constitute injury to "business or property;" defendants disagreed. The District Court held in defendants' favor, and the Eighth Circuit affirmed, holding that "[d]amage to reputation is generally considered personal injury and thus is not an injury to 'business or property' within the meaning of 18 U.S.C. § 1964(c)." Pet. App. A-19. This decision is consistent with common sense and a plain reading of the statute.

In this Court, plaintiffs seek certiorari claiming that there is a split of authority among the circuits. Plaintiffs' position is not correct. The decision of the Eighth Circuit below is in accord with the vast majority of circuit and district court decisions. *See Tsipouras v. W & M Properties, Inc.*, 9 F. Supp. 2d 365, 367-68 (S.D.N.Y. 1998) (injury to character or business reputation is not an injury to business or property under RICO); *City of Chicago Heights v. Lobue*, 914 F. Supp. 279, 285 (N.D. Ill. 1996) (injuries to business reputation are not injuries to business or property under 1964(c)); *In re Teledyne Defense Contracting Derivative Litigation*, 849 F. Supp. 1369, 1372 n.1 (C.D. Cal. 1993) (noting that injuries to business reputation are not cognizable under RICO); *Padilla Rodriguez v. Llorens Quiñones*, 813 F. Supp. 924, 929 (D.P.R. 1993) (holding that damages relating to injury to reputation are personal injuries not recoverable under RICO); *Callan v. State Chemical Mfg. Co.*, 584 F. Supp. 619, 623 (E.D. Pa. 1984) (holding that damages for mental anguish, loss of confidence and self-esteem, and harm to business reputations are not recoverable under RICO); *Mayes v. Local 106, International Union of Operating Engineers*, Case No. 93-CV-716, 1999 WL 60135

(N.D.N.Y. Feb. 5, 1999) (holding that injury to reputation is not injury to business or property); *see also Grogan v. Platt*, 835 F.2d 844, 847 (CA11) ("We agree that had Congress intended to create a federal treble damages remedy for cases involving . . . injury to reputation . . . or the like . . . it could have enacted a statute referring to injury generally, without any restrictive language.") (internal quotation marks omitted) (*quoting Morrison v. Syntex Laboratories, Inc.*, 101 F.R.D. 743, 744 (D.D.C. 1984)), *cert. denied*, 488 U.S. 981 (1988); *John Paul Mitchell Systems v. Eslami*, 110 F.3d 68, 1997 WL 143947 at *3 (CA9 1997) (Table; unpublished decision) ("claimed losses to . . . 'business reputation' . . . are not the type of injuries compensable under RICO") (*citing Teledyne*); *Bowen v. Oistead*, 125 F.3d 800, 806 (CA9 1997) (holding that injury to reputation does not "fall within the statutory definition of 'racketeering activity.' "), *cert. denied*, 118 S. Ct. 2343 (1998); *but see Sadighi v. Daghighfekr*, 36 F. Supp. 2d 279, 292 (D.S.C. 1999) (holding that damage to professional reputation is damage to business or property).

In support of their contention that there is a split in authority among federal courts of appeals, plaintiffs cite only *Khurana v. Innovative Health Care Sys., Inc.*, 130 F.3d 143 (CA5 1997), *vacated*, 119 S. Ct. 442 (1998). In so arguing, however, plaintiffs overlook that *Khurana* does not currently support any legal principles because it was vacated by this Court.[4] Indeed, in vacating the judgment in *Khurana* and remanding for dismissal this Court cited *United States v. Munsingwear*, 340 U.S. 36 (1950), a case which expressly notes that the effect of this Court's vacating a judgment below is to deprive that judgment of all precedential value. *Id.* at

4. On remand, the Fifth Circuit merely dismissed the case as moot, pursuant to this Court's order. *Khurana v. Innovative Health Care Sys., Inc.*, 164 F.3d 900 (1999).

39-40. Even if *Khurana* had not been vacated, moreover, its holding would not create a true split of authority requiring resolution by this Court. In *Khurana*, the issue presented to the Court was whether injury to reputation was a direct injury under RICO. 130 F.3d at 151. Indeed, there is no evidence in the opinion that the defendants ever raised the question of whether injury to reputation was injury to business or property. It is certain that the lower court did not decide this question. Thus, plaintiffs have attempted to create a split of authority where none truly exists and have utterly failed to give any explanation as to why the decision below is not correct.

Because plaintiffs have failed to cite a valid basis for this Court granting certiorari on this issue, the petition for certiorari should be denied.

II. Certiorari On Plaintiffs' 1962(d) Claim Should Be Denied Because Plaintiffs Withdrew Their Claim And Replaced It With One That Would Grossly Distort RICO.

With respect to plaintiffs' RICO claim under § 1962(d), plaintiffs again ask this Court to grant certiorari with respect to only one issue. They state the issue as one of standing to recover for injury caused by overt (non-predicate) acts in furtherance of a RICO conspiracy.

Plaintiffs note in their petition that this Court has granted certiorari in *Beck v. Prupis*, 119 S. Ct. 2046 (1999). Pet. 10. The question on which certiorari was granted in *Beck* is:

> Whether an employee who is terminated for both blowing the whistle on and refusing to participate

> in a pattern of predicate acts of racketeering forbidden by the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 et seq., may assert a civil RICO conspiracy claim, where he has been injured by an overt act in furtherance of the RICO conspiracy, which overt act is not, itself, a predicate act of racketeering.

Petitioners claim that "[t]his case should be heard alongside *Beck v. Prupis*." Pet. 10.

There are several reasons why this Court should not grant certiorari on this issue. First, this case cannot be "heard alongside *Beck*." The *Beck* case has already been briefed and argued and is awaiting decision. At most, therefore, this Court could only "defer" or "hold" this petition pending the issuance of a decision in *Beck*. Even that action would be ill-advised, however, because *Beck* presents a wholly distinct issue from this case.

In *Beck*, the question is whether an employee terminated in furtherance of an alleged RICO conspiracy has stated a cause of action under § 1962(d) of RICO. Although such a claim was originally framed by the plaintiffs in this case in their Second Amended Complaint, the plaintiffs abandoned that claim in the District Court. Pet. App. C-11, C-17, C-18. In its place, and contrary to their Second Amended Complaint, plaintiffs told the Magistrate Judge that their claim was that they were participants in the alleged racketeering activities and that their reputations were diminished by this activity. Accordingly, in deciding the viability of plaintiffs' 1962(d) claim, the Magistrate Judge stated: "To support their RICO claims, Plaintiffs rely solely

on their allegation that, in 'in furtherance of Defendants' conspiracies,' RPR has 'damaged the business reputation of Plaintiffs in the pharmaceutical industry." Pet. App. C-17 – C-18. Consistent therewith, when plaintiffs filed their objection to the Magistrate Judge's Report and Recommendation, they stated again that "adverse employment actions" were not the basis of their RICO claims, but rather that those claims were based only on the so-called damage to their business reputations.

Thus, in this case, the issue critical to plaintiffs' RICO claim under § 1962(d) is whether persons who actively participate in the alleged racketeering activity can recover treble damages for reputational injuries. This Court has not been asked to decide that issue in *Beck*. As such, there would be no purpose in holding this case pending the decision in *Beck*.

Further, the peculiar claim that the plaintiffs present, as plaintiffs *and* participants in the alleged RICO scheme, is not one which merits review by this Court. The District Court below properly understood that permitting plaintiffs to participate in racketeering activity and then to sue for attendant reputational injury would be to distort grossly and to expand the reach of the RICO statute. Indeed, as the Magistrate Judge noted at the oral argument, given plaintiffs' theory, it would be impossible to draw a line among RPR employees as to who had a RICO claim and who did not. Indeed, under plaintiffs' theory, any employee working for a company that allegedly engages in racketeering activity would have a plausible claim for reputational injury by that employee's mere association with the company. Recovery under RICO for such a remote, indirect injury, however, is precisely what this Court rejected in *Holmes v. Securities*

Investor Protection Corp., 503 U.S. 258 (1992), and is precisely why the courts below properly dismissed plaintiffs' RICO claims.

III. Certiorari Should Be Denied Because Resolution Of The Two Issues Presented Would Be Advisory And Not Case Dispositive.

A third reason why this Court should not grant certiorari is because a decision by this Court on the questions raised in plaintiffs' petition would not be case dispositive. More specifically, as noted, *supra*, the District Court articulated four separate grounds for dismissal of the plaintiffs' claims. With regard to their § 1962(d) claim, plaintiffs have only appealed dismissal of that claim on the ground that they lacked standing to assert RICO conspiracy claims. The § 1962(d) claim was also dismissed, however, on the basis of the District Court's determination that, as participants in the allegedly illegal activities, plaintiffs cannot recover under RICO's treble damage remedy and cannot state a claim for reputational injury. Pet. App. C-20, B-10, A-6, A-7.

As to their § 1962(c) claim, plaintiffs only seek review of the lower courts' ruling that an injury to reputation is not an injury to business or property under § 1964(c). Both the District Court and the Court of Appeals, however, based their decision to dismiss the § 1964(c) claims on three other grounds: (1) that the injuries to reputation alleged by plaintiffs were indirect injuries, insufficient to confer standing to assert a substantive RICO claim, Pet. App. A-18 - A-19 (*citing Holmes*, 503 U.S. at 269-70), C-19; (2) that as participants in the alleged illegal conduct, plaintiffs were not eligible to seek treble damages, Pet. App. C-20, B-10, A-6, A-7; and (3) that plaintiffs could not claim to have had their reputations injured by defamation,

when they had admitted that the allegedly damaging things that had purportedly been said about them were, in fact, true, Pet. App. C-20.

Thus, as to both the § 1962(c) claims and the § 1962(d) claims, there are alternative and unappealed legal bases for decision. Moreover, plaintiffs have waived further review of these claims both by their failure to raise certain of them before the Eighth Circuit and by their failure to include them in their petition for certiorari. *See Anderson Marketing, Inc. v. Design House, Inc.*, 70 F.3d 1018, 1020 (CA8 1995) ("It is a fundamental rule of federal appellate procedure that we may only pass on a district court's ruling if a party challenges that ruling on appeal by raising the issue in the opening brief.") (*citing* Fed. R. App. P. 28(a)(2),(4)); Sup. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court.").

As this case involves questions of federal law, this Court has jurisdiction to consider these unappealed issues. *See, e.g., United States National Bank of Oregon v. Independent Insurance Agents of America*, 508 U.S. 439, 446-47 (1993). This Court frequently has held, however, that it is only in exceptional cases that it considers questions not raised in the courts below. *Holly Farms Corp. v. National Labor Relations Board*, 517 U.S. 392, 400 n.7 (1996); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 39 (1989); *Heckler v. Campbell*, 461 U.S. 458, 468-69 n.12 (1983); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940). Similarly, the Court has held that only in exceptional circumstances will it consider questions that were waived below. *United States v. Alvarez-Sanchez*, 511 U.S. 350, 360 n.5 (1994).

This case presents no extraordinary circumstances that warrant resolution of otherwise waived issues. Indeed, as is apparent from the foregoing, this is a case in which plaintiffs have blithely changed their factual allegations after filing their complaints and abandoned or altered their claims as it suits them. Hence, the record below presents a very poor vehicle to decide any RICO issue and certainly presents no compelling reason why this Court should seek to review the decisions of the judges who heard and decided the case below.

CONCLUSION

For all of the foregoing reasons, respondent Rhône-Poulenc Rorer Pharmaceuticals Inc. respectfully submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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